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IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on December 10, 1959 and amended and stayed thereafter.

Opinions Below

The opinions and order on reconsideration of the Civil Aeronautics Board ("the Board") are not reported, but appear in the printed joint appendix used below (479-510, 640-661).*

The opinion of the Court of Appeals, still unreported, is printed in Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1959 and amended January 7, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and 49 U. S. C. §646(f).

Questions Presented

1. As applied to route proceedings before the Civil Aeronautics Board, what is the scope of the "mutual exclusivity" doctrine promulgated by this court in *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327? Thus:

(a) Does that doctrine apply to applications for routes going outside the area of an "area proceeding"; if so, under what circumstances?

(b) Must a carrier's claim of "mutual exclusivity" be resolved by the Board although no evidence is adduced to support it?

(c) Must a tardy claim of "mutual exclusivity" be considered?

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* Unless otherwise stated, numbers in parentheses herein refer to pages of the joint appendix.

(d) Must a hearing be held when "mutual exclusivity" is asserted; if so, what kind of hearing?

(e) What constitutes "economic mutual exclusivity"?

(f) Does that doctrine apply where the Board finds that "mutual exclusivity" does not exist? If it does, what weight must be accorded to the Board's expert conclusion that there is no "mutual exclusivity" and was such weight accorded here?

2. Even if the procedure followed by the Civil Aeronautics Board herein is deemed improper, should its order have been nullified in its entirety as far as the certificate awarded to petitioner was concerned?

3. Under the Civil Aeronautics Act, what finding of need is necessary to award a carrier a route connecting with its existing route?

Statutes Involved

Involved are parts of section 401 of the Civil Aeronautics Act of 1938 ("the Act"), 52 Stat. 987, 49 U. S. C. §481.* Also involved is Rule 12 of the Board's Rules of Practice in Economic Proceedings (14 C. F. R. §302.12).

Relevant provisions are printed in Appendix A.

Statement

For years the Board's route cases—comprising most of its economic proceedings (*infra*, p. 22)—have been vexed by attempts to extend to aviation this court's *Ashbacker* doctrine (*infra*, pp. 5-6).

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* Effective January 1, 1959, the Act was superseded by the Federal Aviation Act, 72 Stat. 737 *ff.*, 49 U. S. C. §1301 *ff.* The statutory provisions involved, however, remain essentially the same. See 49 U. S. C. §1371.

Confusion was to be expected. For *Ashbacker* "poses some difficult problems when applied to air-route certificate proceedings"* and "there must be some limitation to the Ashbacker rule when applied to air routes."**

Confusion actually resulted, as a dozen cases in three circuits testify.*** That confusion has been worse confounded by the decision below. In fact, it is contrary to a Second Circuit decision reached three months earlier.**** Only this court can resolve the issues at stake.

A few basic facts show the practical effect of the holding herein.

1. Eastern Air Lines, Inc. ("Eastern") formerly h[illegible] a monopoly of the route from St. Louis to the Southeas[illegible]

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* *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 347, 249 F. 2d 13, 15.

** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 186, 243 F. 2d 607, 609; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 159, 247 F. 2d 562, 565.

*** *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 85 App. D. C. 412, 178 F. 2d 726; *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board*, 86 App. D. C. 9, 181 F. 2d 777; *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 545 (9 Cir.); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 90 App. D. C. 158, 194 F. 2d 339; *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 42, 228 F. 2d 13; *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 228 F. 2d 17; *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 243 F. 2d 607; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 247 F. 2d 562; *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 249 F. 2d 13; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (2 Cir.), printed in Appendix C hereto. All these cases except the first *Eastern* case cited *Ashbacker*.

**** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (2 Cir., Oct. 7, 1959), printed in Appendix C.

2. Dissatisfied with Eastern's service, the City of St. Louis applied for more air transportation to the Southeast (19-22).

3. The Board found that public convenience and necessity required a competitive air carrier from St. Louis to the Southeast (489-490). The court below sustained that finding (App., pp. B22-B23).

4. After lengthy hearings, the Board found TWA the most qualified applicant to render the new service (490). That finding likewise was sustained (App., p. B24).

5. TWA began service in December 1958. Yet the decision below would deprive St. Louis of this needed additional service, pending exploration by the Board of other applications to fly over other routes in other parts of the country.*

That extension of *Ashbacker*, we propose to show, is unwarranted and unsound.

The *Ashbacker* Case

Ashbacker Radio Corp. v. *Federal Communications Comm.*, 326 U. S. 327, involved two rival applications to operate on the same radio frequency from cities only 35 miles apart. The Commission itself found that simultaneous operation "would result in intolerable interference" and conceded the applications were "actually exclusive" (p. 328). Nonetheless it granted one application without hearing the rival applicant.

This court held that procedure improper. "We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both de-

* Two other route complexes were considered. (1) Southern transcontinental routes between the Pacific Coast and the Southeast, which would not come within 400 miles of St. Louis. (2) A route, sought by Eastern, from St. Louis to the Pacific Coast.

prives the loser of the opportunity which Congress chose to give him" (p. 333).

Two facts will be noted.

1. Mutual exclusivity was conceded. "No suggestion is made here," this court observed, "that it may be possible to make workable adjustments so that both applications can be granted. The Commission concedes that 'these applications are actually exclusive'." (p. 332).

Precisely the opposite is true here. Indeed, the Board found flatly that mutually exclusive applications were not involved (497, 647, 651).

2. This court also said significantly: "There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing" (p. 333).

Here, on the contrary, the Board found (648):

> "We would not be justified in depriving the public for a matter of years of a service that has been found, after extensive evidentiary hearings in which all parties were given an opportunity to participate, to be required by the public convenience and necessity."

Further discussion of *Ashbacker* must await a resume of the facts involved here.

The Area Proceeding

On application by St. Louis (19-22), the Board instituted this proceeding—the *St. Louis-Southeast Service Case*—in March 1956 to consider the need for more airline service in the area "between St. Louis on the one hand and Florida and other southeastern points on the other

hand" (31).* All pending applications for routes within that area were consolidated in the proceeding (97-98).

Area proceedings were expressly sanctioned in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 576-577. But area proceedings breed *Ashbacker* claims. The reason is manifest.

An award of a new route within an area is almost bound to have some impact outside that area. No area is completely isolated.

The existing route structure is highly complex. All major cities have already been placed on the routes of at least two of the eleven major trunkline carriers. Invariably, therefore, some points within the area are linked with places outside the area by existing routes. Nearly always those routes are being operated by some of the applicants for new routes within the area.

Here, for instance, all four applicants for the new St. Louis-Southeast route operated outside that area.** Their applications involved potential services extending beyond the area to numerous extra-area points.***

Consequently it is all but inevitable that an area proceeding will have collateral repercussions extending beyond the area. Almost invariably, too, some carrier claims at

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* Later the area was broadened slightly to include Memphis (91).

** Braniff had St. Louis-Kansas City and St. Louis-Minneapolis/St. Paul authority; Delta, St. Louis-Chicago and Memphis-Kansas City; National, Miami-Havana; and TWA, St. Louis-California.

*** Potentially, Braniff's application involved service between Miami and both Kansas City and Minneapolis/St. Paul; Delta's, Chicago-Tampa and Kansas City-Miami service; National's, St. Louis-Havana service; TWA's, indirect California-Florida service via St. Louis.

some stage that extra-area repercussions will somehow affect its own application for a different route outside the area but in some way connected with it. Citing *Ashbacker*, it wants simultaneous consideration of its extra-area application.

Exactly that happened here. In fact, this case has two *Ashbacker* aspects. One relates to the supposed effect of the new St. Louis-Southeast route on applications for new southern transcontinental routes. The other concerns Eastern's application for a new St. Louis-California route. For clarity, we will take them up separately.

The Southern Transcontinental Routes:
The Existing Routes

Southern transcontinental service between California and the Southeast is now carried on under "interchange" agreements.

Interchange agreements are made between carriers having connecting routes. A single airplane is flown over the entire route. Each carrier, however, operates the airplane only over its segment of the route. At the connecting points, the airplane must stop. A new crew, provided by the next carrier, takes over. The stops and changes in control slow up the operation considerably. Hence an interchange operation suffers from certain inefficiencies.

Two interchange agreements have heretofore provided southern Pacific Coast-Southeast through service. One goes from California, via Dallas and New Orleans, to Miami. The connecting carriers are, successively, American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta") and National Airlines, Inc. ("National"). The other goes from California, via Dallas, to Atlanta. American and Delta are the participants.

The Applications for Additional Southern Transcontinental Service

Interchange service is rapidly becoming obsolete. It does not meet the public demand for air transportation.*

Several applications were, therefore filed for single-carrier southern transcontinental routes. Among the applicants were the carriers operating the existing interchanges—American, Delta and National—and TWA.

All those applications were eventually consolidated into an area proceeding called the *Southern Transcontinental Service Case.*** The Board defined the area involved in that case as (772-773):

> "... that part of the country lying south of a line extending from Jacksonville, Fla., to Atlanta, Ga., Birmingham, Ala., Dallas and Fort Worth, Tex., and thence west to Albuquerque, New Mex., Las Vegas, Nev., and Oakland and San Francisco, Calif."

St. Louis is about 400 miles north of the upper limit of this southern transcontinental area. An indirect route from the Pacific Coast to St. Louis to the Southeast falls outside the *Southern Transcontinental Service Case.* It is simply not a southern transcontinental route.

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*"As compared with single carrier, single plane service, an interchange service is more limited in its flexibility and does not as readily permit the frequent modifications in service necessary to meet the changing needs of air transportation. This arises chiefly from the fact that where two airline managements must agree on each schedule change, the alteration of scheduling often becomes a laborious process." *Denver Service Case*, Order E-9735 (Nov. 14, 1955), pp. 4-5; *Florida-Texas Service Case*, Order E-10635 (Sep. 24, 1956), pp. 3-4.

**That proceeding was not begun until two years after the *St. Louis-Southeast Service Case* (29, 764).

The Interest of American, Delta and National in a Possible TWA Route from St. Louis to the Southeast

TWA has long been authorized to fly between the West Coast and St. Louis. A new TWA route from St. Louis to the Southeast would enable it to carry transcontinental traffic roundabout between Pacific and Southeastern points.

Everybody realized that—in particular, American, Delta and National, the parties to the interchange agreements. Alive to the situation, all three endeavored from the start of the *St. Louis-Southeast Service Case* (58-59, 64-65, 74, 83-84, 128-129) to protect what American termed their "substantial stake in southern transcontinental service" (445-446). In fact American, which did not seek a St. Louis-Southeast route, intervened in the case for that very purpose (445-446).

Until the Board's decision was announced, nobody seriously urged that the potential TWA routing—going hundreds of miles outside the southern transcontinental area—would foreclose new single-carrier southern transcontinental awards (642-643).* But the three interchange carriers were concerned about their existing service. Of all southern transcontinental routes, the inherently inadequate interchanges would be most nearly susceptible to possible TWA competition.

Hence all three carriers proposed limitations to protect their existing southern transcontinental interchange service. Throughout, they contended that any real effect on that service would be eliminated by imposing on TWA's passengers the inconvenience of changing airplanes at St. Louis (58-59, 63-64, 93, 128, 371, 473, 570, 576).

Any limitation protecting the relatively inefficient interchange would *a fortiori* protect a new single-carrier southern transcontinental route.

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* At one stage, National moved to consolidate into the proceeding its pending application for a southern transcontinental route but did not press this maneuver (644-646).

The Board's Initial Consolidation Order

With matters in this posture, the Board entered its initial consolidation order (89-99).

Several carriers—notably Eastern—had sought to expand the case to include applications for new service outside the area. Granting their motions would have embroiled the Board in mammoth full-scale proceedings involving quite different issues. Declining to countenance the inevitable delay, the Board denied the motions (94-97).

But that does not mean the Board went to the other extreme and announced it would ignore the possible impact of a new St. Louis-Southeast route on service beyond the area. Such a ruling would have marked a radical break in the Board's established practice. The point is important to stress.

Many methods are open to resolve a claim that applications are mutually exclusive.* One way is to consolidate the applications, hear them in full on the merits and resolve them together. That procedure, however, is usually open to practical objections.**

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* Three such methods were summarized in *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 97 App. D. C. 46, 51, 228 F. 2d 17, 22. There the court said that, "when two applications are alleged to be mutually exclusive," the Board "may, for example, (1) set for hearing and thereupon decide the issue of exclusivity as a separate preliminary issue; (2) proceed to a comparative hearing upon the two applications without further ado; or (3) set for hearing and thereafter decide the merits of the two applications and also the issue of exclusivity." The Board, as will be seen shortly, uses a fourth method.

** The Board stated them pungently in *Matter of Eastern Air Lines, Inc.*, Docket No. 3292, Order E-9990 (Feb. 9, 1956), pp. 5-6. Among other things, the proceeding becomes unwieldy, long delay results and the Board may find itself considering issues that ultimately emerge as moot.

Hence the Board follows, as here, quite a different practice. Even when it denies consolidation, all concerned are still free to adduce at the hearings evidence of mutual exclusivity. Before it makes any award, the Board can resolve any conflict in the evidence adduced.

That practice was known to all parties here. Only a few months before, in a proceeding of which the *St. Louis-Southeast Service Case* was an outgrowth, the Board had reaffirmed that intervenors in an area proceeding "will be entitled, as in all proceedings where there exists overlapping applications, to urge the mutual exclusivity of their respective proposals."*

Indeed, the Board's practice—once questioned by the District of Columbia Circuit**—was later judicially approved.***

At no time did the Board say herein that it was departing from its settled practice. On the contrary, it expressly indicated that it would consider the impact of any new St. Louis-Southeast route on southern transcontinental service.

To that end, the consolidation order imposed one limitation forthwith: any new flights operating beyond St. Louis

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* *Great Lakes-Southeast Service Case, Order* E-9734 (Nov. 10, 1955), p. 6. The Board referred to that order in its consolidation order herein (93). See also, *Matter of Eastern Air Lines, Inc.*, Docket No. 3292, Order E-9990 (Feb. 9, 1956), p. 5: "Delta remains a party to this proceeding as an intervenor and it is still free, of course, to endeavor to establish mutual exclusivity in accordance with our initial order, if it so desires."

** *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 50, 228 F. 2d 17, 21.

*** *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 249 F. 2d 13, approving Order E-10600 (Sep. 10, 1956), p. 3, issued before the Board denied reconsideration of its consolidation order herein (147); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, . . . F. 2d . . . . . (2 Cir.), approving Order E-9734 (Nov. 10, 1955), p. 6. (See App., pp. C4-C5.)

would have to "be operated with, as a minimum, a scheduled stop at St. Louis" (98). It left the parties free to "advance at the hearing appropriate material bearing on the need for more stringent limitations" (98; see also, 93).

Far from refusing to consider how a new St. Louis-Southeast route would affect southern transcontinental service, the Board made plain that it was awaiting the parties' evidence on that score.

The Hearing

The interchange carriers—American, in particular—availed themselves of the Board's invitation. They adduced evidence (*e.g.*, 208-211; 229-234) relating to the possible impact on their existing southern transcontinental service of a St. Louis-Southeast award to TWA.

Not once at the hearing, however, did they proffer any evidence that such an award would foreclose new southern transcontinental service.

On its phase of the case, Eastern vociferously asserted mutual exclusivity throughout (*e.g.*, 156, 165, 274-275, 398, 405, 618) but offered no evidence to support its claim. The applicants for new southern transcontinental service, however, did not even contend at the hearing that they would be foreclosed by a St. Louis-Southeast award to TWA.

The Board's Decision

The Board found that "the public convenience and necessity require the selection of TWA to operate" the new St. Louis-Southeast route (500-501). It refused to impose any further restriction on that route (496). After weighing the evidence (494-496), it concluded: "We are not persuaded that the impact on the Interchange, nor on American's operations for that matter, will be so great as to require the denial to the traveling public of the service benefits accruing from the through-plane service via St. Louis proposed by TWA" (496).

Significantly, the Board added (497):

> "We have no hesitation in stating that the availability of TWA's service via St. Louis would not in any real sense preclude a finding of public need for a more direct routing, a matter at issue in the newly instituted *Southern Transcontinental Service Case*, Docket No. 7984 *et al.*"

Seeking reconsideration, the interchange carriers came up with *Ashbacker*. The Board rejected their claims of mutual exclusivity as tardy (642-646) and not established "at the hearing stage" (646). "All parties were free to do so, and there were no limitations on the issues that would have prevented them from making a full and complete showing" (646).

On the merits, moreover, the Board held the claims groundless (646-647):

> "... it does not follow that granting TWA authority that would make possible such a service would preclude a subsequent grant of the applications in *Southern Transcontinental* involving possible nonstop and one-stop service by a different and more direct routing and which can derive support from such additional major traffic markets as Dallas, Houston, and New Orleans. We find that the grant of the restricted authority to TWA will not as a matter of economic fact preclude a subsequent grant of southern transcontinental routes via Texas and other southern points in Southern Transcontinental."

The Court's Decision

The Court of Appeals disagreed. Extending *Ashbacker* to the very different situation presented, it said (App., p. B14):

> "A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the

Southern Transcontinental Case and the route awarded in the *St. Louis Case* to TWA appears in this record."

Therefore, it held, a "hearing on the question is required" (App., p. B12). It thought no hearing had been held on that question (App., p. B13). It dismissed the Board's findings that there was no mutual exclusivity as "not based on evidence, and they are not consequent to a hearing on the issue of exclusivity" (App., p. B14).

The legal errors in the court's opinion will be adverted to below. Certain factual assertions, however, should first be noted.

The Court's "*Prima Facie* Indication" of "Economic Mutual Exclusivity"

The court evolved its "*prima facie* indication of economic mutual exclusivity" from two sources.

1. In 1954, the Board had concluded in a different proceeding—on the basis of 1952 traffic conditions which are now obsolete—"that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services" (App., p. B11).

2. American had estimated (234) that an award to TWA would divert 50% of the 1955 interchange traffic (App., pp. B10, B12). This guess was based on the totally unreal assumption that TWA would "implement" the route "to the fullest possible extent" without regard to "the profitability of such implementation" (211).*

Putting these nebulositites together, the court said "it seems to us the TWA service must, *prima facie*, be viewed

* The same points underlie the court's surprising holding that the Board somehow did not really evaluate the impact of the new TWA route on the existing interchange (App., pp. B15-B16).

as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops" (App., p. B12).

The Actual Facts

Implicit in the court's argument is the assumption that former traffic conditions still prevail. That is simply not so. The traffic has increased tremendously since 1952. It is still increasing (765-766).*

Actual experience clinches the matter.

TWA began carrying traffic over the new route in December 1958. Yet traffic over the interchanges flourished.

The record in the *Southern Transcontinental Service Case* shows that "each of the interchange carriers carried substantially more traffic on the interchange flights after the inauguration of TWA's service in December, 1958, than previously. For example, the volume of traffic on American's interchange flights in and out of Dallas increased 35% between March, 1958, and March, 1959; that of Delta increased 35%; and that on National's in and out of New Orleans, approximately 15% (Exhibit Nos. AA-

* The Board's official Air Line Traffic Surveys, which were stipulated below, show that total domestic revenue passenger miles rose from 12.3 billion in 1952 to 28.5 billion in 1959. To illustrate the increase in annual revenue passengers, latest available figures show:

	1952	*1955*	*1958*
Los Angeles-Miami	8,052	19,357	28,730
San Francisco-Miami	4,830	7,670	12,818
Los Angeles-Tampa	3,162	4,758	8,112
San Francisco-Tampa	3,186	2,964	4,615
Los Angeles-Atlanta	4,794	10,426	10,699
San Francisco-Atlanta	4,002	5,603	6,786
Total	28,026	50,778	71,760

1013, 1111; DL ST 93, 93A; NAL 802, 867)."* Interchange flights increased in frequency by 20%.**

Moreover, officers of the interchange carriers testified in the *Southern Transcontinental Service Case* that TWA's route in no way affected the need for direct southern transcontinental service.*** The TWA route via St. Louis was termed "a minor factor, if at all" in the picture.**** In fact, they asserted that TWA's route would "wither on the vine" once a single-carrier southern transcontinental route was authorized.*****

The Court's Belief That the Board Denied a Hearing on Mutual Exclusivity

The court recognized that applicants for new southern transcontinental service "obviously" were initially "well aware of the implications of the TWA application" (App., p. B13). It thought, however, the Board denied them a hearing on mutual exclusivity because it "refused" to "expand the *St. Louis Case* so as to include transcontinental considerations" and "strictly limited that case to issues relating to St. Louis-Southeastern points service" (App., p. B12).

Apart from the legal question whether a hearing was necessary, the court simply misunderstood the situation.

1. The Board did not exclude "transcontinental considerations" from the case. It plainly indicated it would

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* Affidavit of W. D. Brewer, December 31, 1959, par. 3, submitted to the Court of Appeals on TWA's motion for a stay, which was granted.

** *Id.*, par. 4.

*** *Id.*, par. 6.

**** *Id.*, par. 6(d).

***** *Id.*, par. 6(d).

consider the impact of an award on existing southern transcontinental service (*supra*, pp. 12-13).

2. All the Board refused to do was expand the case by consolidating therewith applications for routes beyond the area. But its settled practice (*supra*, p. 12) has been "that all carriers are free to urge mutual exclusivity on the basis of the evidence as to applications not consolidated in a particular case" (693). Nowhere did the Board say it would abandon that practice.

3. By the same token, the "issues relating to St. Louis-Southeastern points service" included those arising from such evidence as the carriers chose to introduce on mutual exclusivity.

4. The carriers had ample opportunity to adduce such evidence. Had they had any, it would surely have been offered—it would have shown *a fortiori* the impact of a new TWA route on the existing southern transcontinental interchanges.

5. Finally, the court held that Eastern was aware "that the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20). If the Board's order left Eastern free to litigate mutual exclusivity, how did it prevent the other carriers from litigating that issue? The court never explained that mystery.*

This brings us to the Eastern phase of the case.

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* We do not mean to suggest that the carriers other than Eastern were not barred from establishing mutual exclusivity by other reasons, *i.e.*, their tardiness and noncompliance with the Board's Rule 12 (App., pp. A4-A5), upheld in *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445. On the contrary, here too we believe the court erred. For brevity, however, that point will not be elaborated here.

Eastern's Claim of Mutual Exclusivity Vis-a-Vis TWA

Eastern already held a monopoly of St. Louis-Southeast service. It had pending applications to fly from St. Louis to California. TWA and American were already serving that route (21, 254-256).

Whether additional St. Louis-California service was needed depended, of course, on considerations entirely different from those governing whether additional St. Louis-Southeast service was needed.

Combining Eastern's existing and proposed routes, it would have several routes from the Atlantic Coast via St. Louis to the West Coast. One such route would duplicate the routing awarded TWA herein. This gave rise to Eastern's principal claim of mutual exclusivity.*

(a) The Proceedings Below

Citing *Ashbacker*, Eastern promptly moved to consolidate its applications for St. Louis-West Coast service into this area proceeding (44).

Declining, for "public interest considerations," to transform the case "into a gigantic proceeding" (650), the Board denied Eastern's motion (92-94, 149).

Eastern remained free, as it recognized, to establish mutual exclusivity at the hearings (156, 274-275, 398, 405, 618). The court remarked on "Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20).

Despite this awareness, Eastern submitted no evidence on the issue.

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* A subsidiary claim, which does not involve TWA, is mentioned *infra*, pp. 21-22.

(b) The Court's Ruling

Under the same circumstances, the Second Circuit said in October 1959, in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (App., p. C6):

> "We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made."

But the court below held otherwise. It said that Eastern's petition for reconsideration of the Board's final order "did refer to some facts on which it relied to show mutual exclusivity" (App., p. B20).* Somehow this tardy reference entitled Eastern to "specific findings," which the court thought had not been made (App., p. B20).

(c) The Board's Findings

While unnecessary, on reconsideration the Board actually made specific findings on the issue (651). Though denying that *Ashbacker* applied, it concluded that "the TWA award will not preclude a later grant of Eastern's application" (651).

The court said it did not understand the Board's reasoning (App., p. B19). Reading the findings in light of Eastern's cryptic petition for reconsideration (618-619), the Board's position seems plain—Eastern was guilty of a basic fallacy.

Eastern argued as if its proposed new St. Louis-West Coast service could be sustained only by traffic moving between the Southeastern and West Coast points served

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* In the Second Circuit case, Eastern followed exactly the same course, as the record on appeal therein (J. A., pp. 1438a-1439a) shows.

by TWA. That traffic, it theorized, could not support two carriers operating large jet aircraft (618).

In effect, said the Board, Eastern's initial premise was false. Two other "varied" sources of traffic could sustain a new Eastern route from St. Louis to the West Coast (651).

(a) Traffic would flow between St. Louis and "the other points west thereof named in its application" (651).

(b) A "substantial volume" of traffic from all the other points on Eastern's widespread routes in the eastern part of the country, *e.g.*, New York, Washington, Boston, Philadelphia, Providence, would "feed into the route" at St. Louis (651).*

The Court's Inconsistent Treatment of Eastern's Position Vis-a-Vis Delta

Curiously enough, the court refused to apply its logic to Eastern's claim of exclusivity *vis-a-vis* Delta.

Delta was already certificated to fly from Kansas City —a point "well outside the area of the case" (App., p. B20)—to Memphis, and then by a very roundabout route to Miami. It was awarded a new route permitting direct Kansas City-Memphis-Southeast service.

But Eastern also wanted a new route (Memphis-Kansas City) which would enable it to provide the same direct service. Hence it claimed mutual exclusivity.

Yet here the court held that *Ashbacker* did not apply; Eastern's claim involved only "expansion of an area case by adding a little additional segment outside the area" (App., p. B21). The "little additional segment" from St.

* This "'back-up' traffic" (651) could, of course, be considered in determining whether a new route should be granted. *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 104 App. D. C. 78, 80, 259 F. 2d 808, 810. So the court conceded here. (App., p. B24).

Louis to Kansas City, "well outside the area," is over 230 miles. Why the Board may ignore mutual exclusivity claims to a route extending 230 miles beyond the area, but must consider other claims where the extension is greater, the court never made clear.

Reasons for Granting the Writ

This case illustrates the intolerable confusion and conflict of decisions caused by extensions of *Ashbacker* to new route cases. The importance of clarifying the law can hardly be overstated.*

The Practical Importance of the Problems

1. The domestic air route system has been constantly expanding. In 1938, it covered 39,300 route miles; by mid-1958, 254,100 route miles. *Annual Report of the Board for 1958*, p. 2.

2. Expansion goes on apace. On June 30, 1957 the Board had 1,450 economic applications pending. A year later the number was 1,616. *Annual Report of the Board for 1958*, p. 41. About 70% were for new routes or amendments of existing routes. *Annual Report of the Board for 1957*, p. 18.

3. Route cases—particularly area cases—almost invariably give rise to *Ashbacker* problems (*supra*, pp. 7-8). And the Court of Appeals' extensions of *Ashbacker* complicate the Board's already complex tasks, entail delay and hinder the administrative process.

There can be no doubt that the court below is expanding *Ashbacker* and causing growing confusion.

* The ramifications of *Ashbacker* extend to many fields other than aviation.

The Confusion Resulting from the Extensions of *Ashbacker*

Ashbacker involved (a) undisputed physical conflict, (b) between applications to operate in the identical area, (c) which the administrative body conceded were mutually exclusive, (d) with no "suggestion" to the contrary, and (e) "no suggestion" that the delay occasioned by a hearing to resolve the conflict would affect the public interest.

Here, however, the court extended *Ashbacker* to situations involving (a) disputed assertions of "economic exclusivity," (b) between applications for routes in different parts of the country, (c) which the Board found were not mutually exclusive, (d) with no real proof to the contrary, despite (e) the Board's finding that the public interest would be adversely affected by further delay involved in additional hearings.

These extensions of *Ashbacker* leave the law in utter confusion. A few examples make that plain.

1. Does *Ashbacker* apply at all to applications for routes going outside the area?

(a) Pragmatic considerations would justify a simple rule that *Ashbacker* should not apply unless mutual exclusivity was practically indisputable.

That rule would avoid delays incident to the resolution of debatable claims of mutual exclusivity. Proceedings involving years of labor could no longer be overturned because a court later disagreed with the Board's evaluation of a dubious claim.

Such a rule would be especially desirable where the claim of mutual exclusivity raised quite collateral issues. St. Louis' need for more Southeast service, for example, would not have to go unsatisfied while the Board explored wholly different considerations relating to Eastern's desire to fly from St. Louis to California.

(b) Apparently the court below prefers a different rule.* But no one knows what its rule is.* It even draws invidious distinctions between routes extending 230 miles outside the area and routes extending farther beyond it (*supra*, pp. 21-22).

2. Must a claim of mutual exclusivity be resolved although no evidence is adduced to support it?

The decisions are in direct conflict.

The Second Circuit held that, when no evidence is offered to support the claim, "the agency may treat the objection as not having been made." *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (Oct. 7, 1959), see App., p. C6.

There, as here, Eastern claimed mutual exclusivity. There, as here, Eastern offered no evidence to substantiate its claim although having ample opportunity to do so. There, as here, when Eastern sought reconsideration, it tried to lend color to the claim. There the Second Circuit held that Eastern's claim was waived. Here the court held it still had to be considered on the merits.

3. Must a tardy claim of mutual exclusivity be considered?

Orderly administration is defeated if afterthoughts—which are not likely to have real merit—must be considered. *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445, so recognizes.**

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* Yet the Second Circuit read *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 243 F. 2d 607, as suggesting "that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings." See *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . , App., p. C4, note 8.

** That case sustained the Board's Rule 12 (App., pp. A4-A5), which is designed to prevent tardy claims of mutual exclusivity

Yet here the court held that, although American's and Delta's belated claims of mutual exclusivity with respect to new southern transcontinental service were not advanced until after the Board's ruling was announced, they had to be considered.

Those carriers were not misled, as the court seemed to suppose, into thinking that mutual exclusivity was not an issue in the case. Eastern admittedly was aware that "the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20). American, Delta and National were equally so aware. Their mutual exclusivity contentions were sheer afterthoughts (*supra*, pp. 10, 14, 17-18). Cf. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579.

4. Must a hearing be held when mutual exclusivity is asserted?

The court below thinks a "full hearing" is "required" (App., p. B20) to resolve every claim of exclusivity—however specious—provided "the allegations of fact are sufficient to raise a debatable question" (App., p. B14). What a "full hearing" entails is unclear.*

Evidently the Board must accept the allegations at face value. It is immaterial that, in light of all the known facts, the Board regards the claim as groundless.

Here the claims of mutual exclusivity were not even *prima facie* sound (*supra*, pp. 15-17, 20-21). But why compel the Board to hold a "full hearing" to evaluate a claim simply because it is alleged plausibly? Such a requirement seems especially formalistic where, as here, the claimants have failed to substantiate their arguments despite ample opportunity. Cf. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579-581.

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* Thus, Eastern had one hearing but, because it mentioned some facts in a petition for reconsideration, the court thought it might be entitled to "a further hearing" (App., p. B20).

5. What constitutes "economic" mutual exclusivity?

Hitherto it had been agreed that "a lessened statistical probability that petitioner will ultimately succeed" was "hardly the sort of denial contemplated" by *Ashbacker*. *Pauley* v. *Federal Communications Comm.*, 86 App. D. C. 294, 295, 181 F. 2d 292, 293.*

That is still the Second Circuit's view. As it noted in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . ., "it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established" (App., p. C5).

Apparently the court below no longer subscribes to that view. Now the claimant's application need not be foreclosed, provided its chance of ultimate success may be lessened.**

6. What weight must be given to the Board's expert evaluation of the claim?

Here the court flouted settled principles. The Board's "informed judgment" is to be accepted. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 581. For "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry." *American*

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* There one channel for a radio station was withdrawn for possible grant to one applicant. Other applicants had to compete for the remaining channels. One of them claimed that *Ashbacker* applied because he had less chance to get a station.

** "Likewise, if the foreseeable traffic would support two carriers and there are, let us say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies" (App., pp. B8-B9).

Airlines, Inc. v. *North American Airlines, Inc.*, 351 U. S. 79, 84; see also, 355 U. S. 465.

Acceptance of the "informed judgment of an expert body" is particularly necessary on *Ashbacker* matters "if a hopeless administrative jumble is to be avoided."* "The problem is typically one for agency judgment."**

Instead the court below felt free to substitute its views for the Board's expert conclusions that mutual exclusivity did not exist. Actual experience demonstrates how far from the mark the court came (*supra*, pp. 16-17).

7. Even if the Board's procedure is held improper, should its order be nullified in its entirety?

The court assumed so. Thus St. Louis would be deprived of needed service to the Southeast, by the carrier selected to render it, while the Board considered collateral issues further.

No such result is necessary. Here it sufficed simply to modify the authorization to TWA by expressly conditioning it on final determination of the mutual exclusivity issue.***. That would have protected the interest of the public and all carriers.

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* *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 85 App. D. C. 412, 413, 178 F. 2d 726, 727.

** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 186, 243 F. 2d 607, 609; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 160, 247 F. 2d 562, 566.

*** *Ashbacker* itself noted that the "Fetzer application was not conditionally granted pending consideration of petitioner's application" (326 U. S., at p. 331). *Peoples Broadcasting Co.* v. *United States*, 93 App. D. C. 78, 80, 209 F. 2d 286, 288, held that a "temporary authorization" in the public interest "was a practical solution of" the exclusivity problem. See also, *Beaumont Broadcasting Corp.* v. *Federal Communications Comm.*, 91 App. D. C. 111, 114, note 13, 202 F. 2d 306, 308-309, note 13; *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 90 App. D. C. 158, 166, 194 F. 2d 339, 346.

Many other problems in the case could be noted.* Enough has been said, however, to show that the public interest calls for clarification by this court of the present confused extensions of *Ashbacker*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 1960

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* For example, the ruling that a further hearing is needed on the impact of TWA's route on the interchange—a subject to which the Board gave especially careful study (494-496, 652-653)—appears clearly erroneous.

APPENDIX A

Pertinent provisions of §401 of the Civil Aeronautics Act of 1938, 52 Stat. 987, as amended, 49 U. S. C., 1952 ed., §481:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and

able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the author-

ized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for inten-

tional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * *

(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Civil Aeronautics Board, Rules of Practice in Economic Proceedings, Part 302, Rule 12 (14 C. F. R. §302.12):

§302.12 CONSOLIDATIONS. (a) The Board, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Board may in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Board will not undertake to search its docket for all

applications which might be consolidated or contemporaneously considered.

(b) *Time for filing.* A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. If made at such conference the motion may be oral. All motions for consolidations or for consideration of issues which enlarge, expand, and change the nature of a proceeding shall be addressed to the Board, unless made orally at the prehearing conference, in which event the presiding Examiner will present such motion to the Board for its decision. A motion which is not timely filed shall be dismissed unless the movant shall clearly show good cause for his failure to file such motion on time. A motion which does not relate to an application pending at the time of or before the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested shall likewise be dismissed unless the movant shall clearly show good cause for his failure to file the application within the prescribed period.

(c) *Answer.* If a motion to consolidate two or more proceedings is filed with the Board, any party to any of such proceedings, or any person who has a petition for intervention pending, may file an answer to such motion within such period as the Board may permit. The Examiner may require that answers to such motions be stated orally at the prehearing conference in the proceeding with which the consolidation is proposed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14798

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF NASHVILLE and THE NASHVILLE CHAMBER OF COMMERCE,
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

No. 14804

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

Appendix B

No. 14812

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
DELTA AIR LINES, INC.,
INTERVENORS

No. 14822

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
INTERVENORS

On Petitions to Review Orders of the Civil Aeronautics Board

Decided December 10, 1959

Before PRETTYMAN, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PRETTYMAN, Chief Judge: These are four petitions for review of orders of the Civil Aeronautics Board made in its *St. Louis-Southeast Service Case*. Principally the Board awarded to Trans World Airlines, Inc. (TWA) a new route from St. Louis to Miami and other Florida coast points, and to Delta Air Lines, Inc., a new Memphis-Birmingham route.

The cases in this court fall into two main parts, one relating to each of the above-mentioned awards. The discussion, however, more aptly falls into four divisions: (I) The mutual-exclusivity contentions advanced by American, Delta and National. These carriers claim that TWA was awarded an effective southern transcontinental route without consideration of economically mutually exclusive applications. (II) Impact of the award to TWA on an existing southern transcontinental interchange arrangement. (III) Eastern's contentions concerning mutual exclusivity. Eastern claims that the Board erroneously made awards to TWA and Delta without comparative consideration of its mutually exclusive applications. (IV) The merits of the TWA and Delta awards, apart from mutual-exclusivity arguments, and some miscellaneous contentions.

I

Two proceedings before the Board play parts in this problem. One is the *St. Louis-Southeast Service Case*, which was instituted to inquire into the need for service "between St. Louis on the one hand and Florida and other southeastern points on the other". Several applications were consolidated in that case.[1] As we have noted, the orders here under review were entered in that

[1] Order No. E-10304 (May 18, 1956); Order No. E-10651 (Oct. 2, 1956).

proceeding. The other case which plays a part in the contentions made to us is known as the *Southern Transcontinental Services Case*. It was a combination of several proceedings, which initially had various names. In its order of consolidation in the *Southern Transcontinental Case*[2] the Board delineated the scope of the proceeding to include (1) the need for single-carrier service between Houston and West Coast points, (2) the need for "single-carrier transcontinental service" between Florida points and the West Coast, and (3) the need for single-carrier transcontinental service between Atlanta-Birmingham and the West Coast. In that order the Board repeatedly used the expression "southern transcontinental route". The Board explained that in prescribing the scope of this hearing it intended to consider new or additional through service in the southern tier of states, that is, from Florida across the southern boundary of the country to and including California. The Board said in that connection: "* * * it is necessary to establish a framework in which all major southern transcontinental service issues as a whole can be determined for the foreseeable future." As thus arranged, the case included a large number of applications.

In the *St. Louis Case* various preliminary motions were made by different carriers, which motions fall generally into two classes. The first class was for expansion of the proceeding to include applications for extensions westward of existing routes into St. Louis from the East, so as to add to them routes from St. Louis to the West Coast, and in the opposite direction for extensions eastward of existing routes into St. Louis from the West, so as to add to them routes from St. Louis to the Southeast. These motions were denied. The other class of motions was to impose restrictions upon any grant of a new route from St. Louis to Florida points, so as to prevent any

[2] Order No. E-12861 (Aug. 5, 1958); Order No. E-13132 (Nov. 4, 1958).

grant of such a route from being in effect a through service Florida-California via St. Louis. In response to these motions the Board announced as a minimum restriction a requirement that service on any route granted between California points and Florida points via St. Louis must include a stop at St. Louis. And the Board further announced that the parties would not be foreclosed from advancing in the course of the hearing appropriate evidence which might reflect a necessity for more stringent limitations. Thus the Board limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points.

The Board awarded to TWA the route from St. Louis to Florida points[3] and imposed as the sole limitation the previously described mandatory stop requirement at St. Louis. TWA was already certificated for through service from St. Louis to California coast points, and the new award was cast in the form of an amendment to TWA's existing Route 2, which was the St. Louis-West Coast route. The effect of the order was to authorize one-plane, one-carrier, through service from Florida coast points to California coast points via St. Louis, with a mandatory stop at St. Louis.

The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, "operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta American Interchange, and bring important service benefits to a respectable portion of the

[3] Order No. E-13026 (Sept. 30, 1958); Order No. E-13248 (Dec. 8, 1958).

passengers moving in these markets." And in its ruling on a motion for reconsideration the Board said:

> "The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these 'beyond area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

The principal point made by petitioners as to this award is that the Board could not restrict the nature and scope of the *St. Louis Case* to considerations limited to St. Louis-Florida points service, and then in that same case make an award which was for all practical purposes a one-carrier, one-plane, through transcontinental Florida to California route, when there were pending unheard in another proceeding (the *Southern Transcontinental Case*) many applications for transcontinental service Florida to California. This argument is premised upon the fact that the route awarded TWA makes its Florida-California service very slightly longer than would be any route which might be awarded in the *Southern Transcontinental Case*. This method of reaching an award, say the petitioners, is a direct evasion of the *Ashbacker* doctrine.[4]

The law which was established by the Supreme Court in the *Ashbacker* case has been sloganized, given a name, and is often discussed as though it were a technicality. The law which the Court there laid down was far from a technicality. The statute involved (the Communications Act) provided in effect that applicants for licenses should have a right to a hearing before their applications are denied. Two applications which were mutually exclusive were pending. The Court held that the Commission could

[4] Ashbacker Radio Co. v. Federal Communications Comm'n. 326 U. S. 327 (1945).

not grant one without a hearing of the other. The Court said, *inter alia*:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before a denial of their applications becomes an empty thing."[5]

The ruling was a practical conclusion of sound common sense. It is simply a realistic truth that, if only one of several applications can be granted, an award to one applicant is as effective a denial of all the others as would be a flat order of denial.

The foregoing conclusions were premised upon a physical mutual exclusivity of two licenses. It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[6] We now iterate the doctrine there stated: the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine.

Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity.[7] The public

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[5] *Id.* at 330.

[6] 100 U. S. App. D. C. 184, 243 F. 2d 607 (1956), cited and quoted in Eastern Air Lines v. Civil Aeronautics Board, 101 U. S. App. D. C. 156, 247 F. 2d 562 (1957).

[7] As to air transportation, Sec. 401(d)(1), Civil Aeronautics Act, 52 STAT. 987 (1938). The Federal Aviation Act of 1958, which supersedes the Civil Aeronautics Act, contains the same provision. Sec. 401(d)(1), 72 STAT. 754, 49 U. S. C. A. §1371(d)(1).

interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co.* v. *Federal Communications Comm'n.*[8]

The Civil Aeronautics Act[9] requires notice and hearing on applications for certificates for new routes, and also requires notice and hearing upon petitions for modifications of existing licenses, which latter include extensions of existing routes.[10] Under the Act (Sections 401 (d)(1) and 401(h))[11] a finding of public convenience and necessity is a requirement for either the grant of a new certificate or the extension of an existing route. So the principles we have been discussing apply to air certifications. If the grant of one of several applications for a new route does, as a matter of economic necessity, preclude the grant of any other application, the doctrine of *Ashbacker* clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us

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[8] 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). The principle is also discussed at length in the dissent in RCA Communications v. Federal Communications Comm'n, 91 U. S. App. D. C. 289, 294-296, 201 F. 2d 694, 699-701 (D. C. Cir. 1952), with citations, and is a thread which runs through the opinion of the Supreme Court in that case, Federal Communications Comm'n v. RCA Communications, Inc., 346 U. S. 86 (1953). This was a telegraph case, in which the competition involved was economic, not a radio case in which the exclusivity is physical. Gerico Investment Co. v. Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958), prior to *Carroll*, contains a clear intimation to the same effect.

[9] Sec. 401(c), 52 STAT. 987 (1938), as reenacted, 49 U. S. C. A. §1371(c).

[10] Sec. 401(h), 52 STAT. 989 (1938), as reenacted, 49 U. S. C. A. §1371(g). See, *e.g.*, Eastern Air Lines, Inc., et al., Great Lakes to Florida Service, 6 C. A. B. 429 (1945); Delta Air Corp., et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 (1941).

[11] *Supra* notes 7 and 10.

say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies.

The Board denies the applicability of *Ashbacker* in this latter situation and refers us to *Pauley* v. *Federal Communications Comm'n.*[12] However that case involved neither a grant nor a denial of an application and thus is not remotely pertinent to the situation now before us.

The doctrine of *Ashbacker* also applies where a request for an extension of an existing route would preclude the grant of other pending applications for the entire route. If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant. The Board has frequently recognized and applied this latter rule; as a matter of fact it almost always does so.[13]

This brings us to a consideration of the practicalities of the situation in the case before us. The characteristics of a restricted-area service are entirely different from those of a transcontinental service. This is well recognized in the industry. We think the Board cannot be compelled to expand an area case: but at the same time it cannot be permitted to transform the nature of

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[12] 86 U. S. App. D. C. 294, 181 F. 2d 292 (D. C. Cir. 1950).

[13] See, *e.g.*, Southern Transcontinental Service Case and Dallas to the West Service Case, C. A. B. Order No. E-12861 (Aug. 5, 1958); Investigation of Service to Winston-Salem and/or Greensboro-High Point, C. A. B. Order No. E-12873 (Aug. 8, 1958), 1A Av. L. Rep. par. 22,192; Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953); Transcontinental & Western Air, Inc., et al., Detroit-Memphis Service, 6 C. A. B. 117 (1944). *Cf.* Seven States Area Investigation, C. A. B. Order No. E-13254 (Dec. 8, 1958), 1A Av. L. Rep. par. 22,226, 22,226.11 (new competitive service would be too costly to the Government in subsidies).

an area case without applying to it the factors which govern the case as transformed. It cannot hear an area case and, without more, make a transcontinental award. It cannot thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive with the award being made. Petitioners, or some of them, had pending applications for through routes Florida to California coast. These were consolidated in the *Southern Transcontinental Case*. They endeavored by motions in the *St. Louis Case* to persuade the Board to do one of two things, either restrict any award in that case so stringently as to preclude its being an effective through southern transcontinental route or give comparative hearing to all pending applications for such a route. They now argue to us that the maximum power of the Board under the statute, construed according to *Ashbacker*, was limited to these two alternatives. The Board apparently agrees with the general principles underlying these arguments; references to them appear in the orders of consolidation.

So the first debated question is whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.

In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.

In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National.[14] A year later the Board, without further hearings, authorized a competitive interchange service.[15] This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing.[16] The Board then found that the proposed new service would be hopelessly uneconomic and denied the certificate.[17] One finding of the Board was that:

> "* * * the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami."[18]

The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions.[19] Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services.

All the applications consolidated in the *Southern Transcontinental Case* seem to have included the possibility of one or more stops. Nowhere is it made to appear that

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[14] Southern Service to the West Case, 12 C. A. B. 518.

[15] Southern Service to the West Case, 14 C. A. B. 310 (1951); Southern Service to the West Case, 15 C. A. B. 94 (1952).

[16] Southern Service to the West Case, 15 C. A. B. 124.

[17] Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953).

[18] *Id.* at 236.

[19] Southern Service to the West Case, Reopened, 18 C. A. B. 790 (1954).

any such applicant sought only a nonstop certificate, to which service the TWA one-stop service might not be potentially competitive. The comparative circuity of the St. Louis route over the proposed through routes would appear to be no greater than over the existing interchange. If the TWA one-stop service is an effective competitor to the existing interchange to the extent of a 50 per cent diversion of the latter's business (assumed by the Board *arguendo*), it seems to us the TWA service must, *prima facie*, be viewed as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops. And, if the Florida-California business via interchange is enough to support service on only one route, the same business available via one carrier, but with a stop, would appear *prima facie* to be not too much greater. If these things be so, an analysis and evaluation of the available business is necessary, if demanded. To state the matter in other terms, if mutual economic exclusivity is claimed and the claim has a reasonable *prima facie* basis, hearing on the question is required.

The Board submits several answers to the foregoing. In the first place the Board says that the motions for consolidation in the *St. Louis Case* filed by some of the applicants for single-plane, single-carrier service from Florida to California were filed too late. Rule 12(b) of the Board's Rules[20] requires that motions to consolidate must be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. In the circumstances of the present case this is an unrealistic suggestion. Some of these applicants made efforts to have the Board expand the *St. Louis Case* so as to include transcontinental considerations. This the Board refused to do. The Board strictly limited that case to issues relating to St. Louis-Southeastern points service. With the issues

[20] 14 CFR 302.12(b).

thus restricted, counsel for these applicants properly restricted their participation to the presentation of evidence which was relevant to those issues. As a matter of fact the Administrative Procedure Act[21] requires the exclusion of irrelevant evidence. Indeed, as the Board seems to recognize in a footnote (5) to its opinion on reconsideration, the posing of the issue as to restrictions was an indication that the Board would prevent any award in the case from being a transcontinental route—quite the contrary to any indication that transcontinental service was to be the subject of the hearing.

In the second place the Board says that all of these applicants were in fact participants in the *St. Louis Case* and, as such, had an opportunity to present whatever evidence they desired to present. But this suggestion is also unrealistic under the view which we have described as applicable to the timeliness point. The Board says that these applicants were well aware of the implications of the TWA application. They obviously were initially so aware, as is evidenced by their various motions and informal requests at the beginning of the case; but, as we have pointed out, the Board severely restricted the issues to be adjudicated and as to which these parties (as applicants or as intervenors) were permitted to participate.

In the third place the Board says it made findings to the effect that there is no mutual exclusivity between the TWA award and the possible grant or grants of the applications now consolidated in the *Southern Transcontinental Case*. The Board points to certain passages in its two opinions as being findings that there was no mutual exclusivity. It cites to us such passages as that the TWA route "would not in any real sense preclude a finding of public need for a more direct routing," and that the

[21] Sec. 7(c), 60 STAT. 241 (1946), 5 U. S. C. A. §1006(c).

award would not "warrant the assumption that TWA will thereby obtain preferential status in deciding the issues in that case." The Board recited that there is no mutual exclusivity, but the quotations hardly qualify as "findings". They are not based on evidence, and they are not consequent to a hearing on the issue of exclusivity.

The question presently before us is not whether the Board might on some evidence before it conclude that there was no mutual exclusivity; the question is whether the applicants are entitled to a hearing on the issue. Their statutory right is to a hearing before denial of their applications; provided, of course, that the allegations of fact are sufficient to raise a debatable question. The right to a hearing is the sole question before us.

On this part of the case we hold: (1) The Board had ample authority to limit the *St. Louis-Southeast Case* to considerations pertinent to that area. (2) After the Board had restricted the case to area considerations and had proceeded to the end on that basis, it could not, in that same case, make a transcontinental award. (3) A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the *Southern Transcontinental Case* and the route awarded in the *St. Louis Case* to TWA appears in this record. The case must therefore be remanded.

We do not intimate to the Board what steps it should take upon this remand. Our holding does not necessitate a full evidentiary comparative hearing on all applications for a southern transcontinental route. The Board might, among a number of alternative courses, (1) hold a hearing upon the exclusivity question alone or (2) impose such a restriction upon the route awarded to TWA via St. Louis as to insure that it would not be an effective competitor with any single-plane, single-carrier transcontinental route which might result from the *Southern Transcontinental Case*.

II

As we have indicated, a three-carrier interchange authorizing Florida California service via New Orleans and Dallas had been licensed in 1951. American argues that the award of a competitive transcontinental service Florida to the West Coast would be a modification of the existing interchange license to which it is a party. We held to the contrary in the *Gerico* case,[22] there concluding that economic damage to an existing licensee is not a modification of the existing license, absent agency rules guaranteeing protection from economic injury.

Petitioners American and Delta also argue that the foreseeable impact of a possible award in the *St. Louis Case* was clearly such as to raise an issue of the public interest in a duplication of services. We have said enough under I, *supra*, to show we agree with that argument. The question required solution by evidence and findings, if a transcontinental award was to be made.

The Board recited its conclusion that the award to TWA was required by the public interest and necessity. But that conclusion was related to a St. Louis-Southeastern-points route. It is entirely true that in making such a finding in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors. We pointed this out in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*.[23] But that is not our present problem. The problem is the public interest in a competing southern transcontinental service.

The Board makes much of the point that the foreseeable diversion of traffic from the interchange partners is not material to them in the light of their overall re-

[22] Gerico Investment Co. v. Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958).

[23] 104 U. S. App. D. C. 78, 259 F. 2d 808 (1958).

sources. The point is immaterial on the question whether these carriers are entitled to a hearing on the possible existence of mutual exclusivity.

III

We come now to Eastern's contentions respecting its application for an extension of its Route 10 westward from St. Louis to the West Coast and its application for an extension from Memphis to Kansas City. The former controversy concerns the award to TWA and the latter the award to Delta.

Eastern's motion in the St. Louis Case for consolidation of its pending application for a westward extension of Route 10 was denied. Eastern contends that without comparative consideration of its (Eastern's) application the award to TWA of a transcontinental service virtually identical to that proposed by Eastern violated the latter's rights under *Ashbacker*.

Eastern's application for a westward extension of Route 10 must be considered from two points of view. It must be considered from the point of view of the case as a St. Louis-Southeastern-area case, which is what the Board declared it to be. Then it must be considered from the point of view of a through southern transcontinental route, which is what our petitioners say the Board considered in fact.

Eastern has a network of certificated routes spread over the eastern half of the country, with westernmost termini at Chicago, St. Louis, Memphis and San Antonio. An extension from St. Louis to the West Coast would in actual practical fact create for Eastern a Boston-New York-West Coast route via St. Louis, as well as a Florida-West Coast route. The traffic accumulated by the Boston-St. Louis network is part of the "back-up traffic" which the Board says would be fed by Eastern into its new segment St. Louis-West Coast. That the traffic thus

picked up in the Northeast would be greater than that originating in the Southeast seems obvious.

Quite clearly the route sought by Eastern from St. Louis westward was not within the area of the case. Also quite clearly its route Boston-New York-West Coast via St. Louis would not have been a southern transcontinental route. So, if that were all that is involved, no problem would be presented. But, as we have noted, Eastern's requested extension would also connect at St. Louis with its existing St. Louis-Florida-coast route.

We first consider Eastern's application as a part of the *St. Louis Case* as a true area case. Eastern's extension west and TWA's extension east presented different problems in respect to traffic and the area. TWA's extension was physically within the area, and the out-of-area traffic which was involved would flow from existing routes into and through the area over the new segment. This traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area.

The basic consideration in an area case is, of course, the public interest in and necessity for service in the area. It seems to us that the need of the area for service to traffic coming in from the outside and also the need of the area for service from inside the area to the outside are both proper considerations in an area case. And so the Board can properly take such needs into consideration. But we think the needs of outside traffic, considered as such, are not necessarily pertinent to an area case. Thus, to illustrate, if traffic originating in Seattle wanted very badly to go to Miami, such need, if not linked with some need inside the southeast area, would not be relevant to a southeast area case. The Board could restrict the area case by excluding such wholly outside data.

Eastern's new segment would have been outside the area, and the traffic picked up by it would have been newly picked up for transportation into the area over an existing service in the area. In other words, this application posed the problem of creating in an area service case a new route outside the area for the purpose, or with the effect, of bringing traffic into the area under consideration. We think the Board cannot be compelled to expand an area case in that way. We think this situation falls within the power of judgment vested in the Board to limit these area cases. We find no error which would require or justify our interference in the Board's decision as a limitation upon a true area case.

We now look at this application of Eastern as part of a southern transcontinental consideration, which, as we have pointed out, is what the Board appears to have undertaken and decided in part in this proceeding. Eastern's existing certificate for Route 10 apparently authorized through service St. Louis-Florida coast points. The record shows, as the Board recites in its Order No. E-13026, that Eastern actually began the operation of such a through service St. Louis-Miami nonstop. So Eastern's application for an extension westward from St. Louis would have given it a Florida-West Coast route with one stop at St. Louis. The eastward extension awarded TWA was St. Louis-Miami via intermediate points Nashville, Atlanta, Tampa and St. Petersburg. So TWA under the award could duplicate Eastern's existing St. Louis-Florida service, either with the stops indicated or nonstop, and the transcontinental route created for TWA by the award is a duplicate of the transcontinental route which would have been created for Eastern by a grant of its application.

Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants

for transcontinental certificates, discussed by us in I, *supra*.

The one factor possibly differentiating Eastern's transcontinental application from those of the other applicants in this case is that Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East. It was on this basis, and on a consideration of the potential traffic between St. Louis and points west thereof named in the application, that the Board reached its conclusion of no mutual exclusivity. The direct question as to exclusivity is whether TWA's St. Louis-Florida segment will prevent a grant of Eastern's St. Louis-West Coast segment. These are not two segments over the same route but come into competition one with the other when they are linked up with the respective existing networks. Thus the whole of both carriers' systems seem to be involved. The Board mentioned as a decisive factor the whole of Eastern's potential traffic, given the new award. It did not mention the comparative whole of TWA's potential traffic, given the new award. The Board's reasoning and the bases for its conclusion on this point are by no means clear. It refers to the substantial "back-up" traffic available to Eastern from its entire eastern network and to "these varied traffic sources". This could mean (1) that the Board did consider the whole of the traffic potentialities of both carriers, or (2) that the Board deemed the traffic potential of the single St. Louis-Southeast route awarded TWA as *de minimis* in comparison with the whole of the traffic potentially available to Eastern from the entire southeastern area and the Northeast, or (3) some other meaning not readily discernible. So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor.

The Board contends that Eastern did not avail itself of the opportunity presented to it to offer evidence in support of its claim of exclusivity. The record shows, however, that Eastern, in its petition for reconsideration of the Board Order No. E-13026, did refer to some facts on which it relied to show mutual exclusivity. The Board's reply, with its reference only to traffic available to Eastern, was inadequate. Therefore, despite Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing, the Board's failure to make the necessary specific findings deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board*.[24]

In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make adequate findings upon the problem of exclusivity, which may or may not involve a further hearing.

The situation of Eastern *vis-a-vis* Delta is that Delta applied for and was awarded a new segment Memphis-Birmingham, which was within the St. Louis-Southeastern area and constituted a link in a St. Louis-Florida coast service, whereas Eastern applied for and was denied a new segment Memphis-Kansas City, the latter point being well outside the area of the case and this segment being no part of a St. Louis-Southeastern service. The question is whether Eastern's Memphis-Kansas City application was required to be consolidated for comparative hearing with Delta's Memphis-Birmingham application.

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[24] 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955). It is true that, unlike the instant case, the *Delta* case did not involve an application for a new route segment outside the limited area under consideration. However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route.

Delta already has certificated routes in the St. Louis-Southeastern area. These include routes from St. Louis to Memphis and from Memphis roundabout to Jackson-Meridian-Birmingham-Atlanta and thence to Miami. It also has a route Kansas City-Memphis. Eastern, as we have noted, already has certificated routes in the St. Louis-Southeastern area, among them one Memphis-Birmingham-Atlanta and thence to Miami. Eastern urges that the grant to Delta of the Memphis-Birmingham segment creates for Delta a through service Kansas City-Florida coast, and that its (Eastern's) application for a segment Kansas City-Memphis would have created for it, *inter alia*, precisely the same through service Kansas City-Florida points. The Board says (1) that consideration of this Eastern application would be an unwarranted expansion of the area case, and further (2) that the mandatory stops required by it to be made by Delta on any single-plane flights Kansas City-Florida points are sufficient to prevent the award from creating a service which would in any degree preclude an eventual grant to Eastern of the Kansas City-Memphis extension, with authority to overfly Memphis.

Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case*, apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment.

Eastern complains that, although the Delta award would not be mutually exclusive with one part of its application,

it would preclude the award to Eastern of another part of its application, namely, the identical route, with the same mandatory stops, as that obtained by Delta. Eastern complains that the Board made no finding on this point. This Kansas City-Memphis-Birmingham-Atlanta-Florida route would be one of many combinations of routes available to Eastern from Kansas City to Southeast points. But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications. We think there is no such requirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system.

IV

Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; that the record requires a finding that Eastern could and would satisfy all service needs in the St. Louis-Southeast market; that the Board failed to make sufficient findings on the cumulative diversion of revenue from Eastern because of awards made in this and other cases; that the Board failed to make adequate findings of the market potential; and that TWA was awarded an Atlanta-Florida service without any finding of need for such service. We have examined the record and find these contentions to be

without merit. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board. Eastern's basic arguments concerning the lack of need for the creation of new service competitive to Eastern in the St. Louis-Southeast market are intimately tied to its contention that the Board erroneously failed to reopen the record to receive new evidence of Eastern's operations after the commencement of the hearings. These several contentions of Eastern must be viewed against the background of findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area. Upon the facts of this case, we think the Board did not abuse its discretion in declining to reopen the record.

It is true that the Board did not find any need for the Atlanta-Florida service awarded to TWA, considered as local service. But it specifically found a need for trunkline service from St. Louis-Nashville to both Atlanta and Florida. We find no error in the Board's award of the route without an absolute restriction against local service between Atlanta and Florida.[25] The Board did place a long-haul restriction on the Atlanta-Florida segment awarded to TWA.

Delta, while agreeing with the Board's findings on the need for a new competitive St. Louis-Southeast route, contends that the Board erred in that it awarded the new route to TWA on the basis of a "need" not in issue and failed to make certain comparative findings as to Delta's and TWA's qualifications for the route. Delta attempts to demonstrate that the Board, without so saying, actually picked TWA as the awardee upon a consideration

[25] It should be noted that Eastern made no request for any such restriction.

of needs of out-of-area traffic. It says the Board specifically excluded from the issues in the case the service needs of out-of-area traffic, *i.e.*, the needs of cities west and north of St. Louis for service to the Southeast area. Nevertheless, says Delta, the Board based the award to TWA upon such needs. But it clearly appears that the only use the Board made of out-of-area traffic data was as one of the factors in selecting the carrier best able to meet the needs of the area. The Board said:

> "Aside from seasonal factors, the end-on integration of the extension from St. Louis to the Southeast with that portion of route No. 2 extending west of St. Louis will permit TWA to combine the traffic flow to and from cities east and west of St. Louis, *so as to support maximum frequencies in the St. Louis-Southeast markets and better develop the traffic potential in this area.*" (Emphasis added.)

This course was approved by us in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, *supra*, and discussed herein in relation to Eastern's claim. The use of out-of-area traffic data for these purposes has no relevance to the point discussed by us in Part I, *supra*, which was the right of competing applications to a hearing when a transcontinental route is being awarded. We find no reversible error in the Board's selection of TWA as the awardee, if the Board is to make an area award only.

We have examined Delta's remaining contention, that the Board failed to make adequate comparative findings on certain points and find nothing that requires us to disturb the Board's disposition. It is clear that the Board in its original opinion discussed Delta's qualifications in comparison to those of TWA. Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Appendix B

Before:

Prettyman, Chief Judge, Bazelon and Fahy
Circuit Judges, in Chambers.

ORDER

Upon consideration of the motion of Delta Air Lines, Inc., to conform judgment of this court to the opinion, it is

ORDERED that the judgment of this court in these cases is amended to read as follows:

"These cases came on to be heard on the record from the Civil Aeronautics Board and were argued by counsel.

"On consideration whereof, it is ORDERED and adjudged by this court that the orders of the Civil Aeronautics Board on review in these cases are affirmed with respect to the award to Delta Air Lines, Inc., and are reversed with respect to the award to Trans World Airlines, Inc., and that with respect to the award to Trans World Airlines, Inc., these cases are remanded to the Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this court."

It is FURTHER ORDERED by the court, sua sponte, that the last paragraph of the opinion of this court is amended to read as follows:

"Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion."

Dated: January 7 1960

Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 342, 344—October Term, 1958.

(Argued June 3, 1959 Decided October 7, 1959.)

Docket Nos. 25422, 25434, 25532

EASTERN AIR LINES, INC., CAPITOL AIRWAYS, INC., NATIONAL AIRLINES, INC., CITY OF NASHVILLE and the NASHVILLE CHAMBER OF COMMERCE,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL AIRLINES, INC., *et al.*,

Intervenors.

Before:

CLARK, *Chief Judge,*
LUMBARD and WATERMAN, *Circuit Judges.*

The several petitioners bring their respective petitions seeking review of orders of Civil Aeronautics Board entered in the *Great Lakes-Southeast Service Case* wherein that Board granted certain applications and denied others, all pursuant to Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, for certificates of public convenience and necessity to perform new air transportation service.

The several petitions are each denied. Capitol moved for the appointment of a Commissioner or Referee to determine matters relative to procurement of Congressional testimony. This motion is denied.

WATERMAN, *Circuit Judge*:

Presented here for our decision are three separate petitions for review of orders of the Civil Aeronautics Board[1] arising out of the "Great Lakes-Southeast Service Case."[2] These orders marked the culmination of an extensive hearing[3] on new route applications for service between points in a specified geographic area of the Middle West on the one hand and Florida on the other. The Board's ultimate decision, insofar as pertinent to this opinion, was as follows: Northwest Airlines was awarded a route between Miami and Chicago; the authority of Delta Air Lines was extended so as to permit Miami-Detroit service; and that

[1] The orders are E-13024, the Board's formal opinion in the *Great Lakes-Southeast Service Case*, rendered on September 30, 1958, and E-13211, entitled "Opinion and Order Granting and Denying Stay of Effective Date of Certificates," rendered November 28, 1958. In view of our disposition of the contentions herein we need not decide whether the second order was effective to supplement the formal opinion, but see *Frontier Airlines* v. *CAB*, 259 F. 2d. 808, 810-811 (D. C. Cir. 1958).

[2] Applications for new route certification are normally decided by the Board in a consolidated "area proceeding." The Board establishes a given geographic area. Thereupon all applications for routes within this area are considered jointly. This Board procedure was approved by the Supreme Court in *CAB* v. *State Airlines*, 338 U. S. 572 (1950).

[3] Some idea of the breadth and complexity of the investigation can be obtained from the following statistics. There were 42 route applications, made by 10 carrier applicants. There were 5 carrier intervenors, 40 civic intervenors, and 42 limited participants. The record consists of 29 volumes totaling 16,000 pages. The evidentiary hearing lasted 8 weeks. The Initial Decision covered 378 pages. The two orders here objected to consist of a modest 88 pages.

of Capital Airlines[4] was extended so as to confer upon it authority to render service between Miami and the three cities of Cleveland, Pittsburgh, and Buffalo. Prior to these awards the route between Miami and Chicago was served by both Delta and Eastern Air Lines; Eastern offered the only single-carrier service between Miami and the cities of Detroit, Cleveland and Pittsubrgh;[5] and between Miami and Buffalo there was no direct service. Petitioners are as follows: Eastern, which objects to all three awards; Capitol Airways,[6] an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes, which objects to the Board decision as to these routes; and the City of Nashville, Tennessee, which objects to the fact that the Board drew the geographical boundaries of the "area proceeding" in such a manner that service to and from Nashville was excluded from consideration.

Eastern

Eastern's primary contention is that the Board has violated the principle of *Ashbacker Radio Corp* v. *FCC*, 326 U. S. 327 (1945) in failing to consolidate in this "Great Lakes-Southeast Service Case" an Eastern application for extension of its route authority from Chicago to Minneapolis/St. Paul so that this extension application would be considered along with the proposals by the other carriers for new service between Chicago and Miami. By its con-

[4] Capital Airlines is not to be confused with Capitol Airways, a petitioner herein. Capital is a certificated carrier whose routes cover much of the eastern half of the country.

[5] The Board has authorized "interchange" arrangements between Miami and these cities, providing for single-plane service over the routes of two airlines. From the briefs we gather that these arrangements have not been particularly successful.

[6] Capitol is an uncertificated carrier operating under a Board exemption. Its principal business has consisted of performing charter services for the military. For one year, ending July 1955, it conducted scheduled passenger operations within the State of Tennessee.

solidation order E-9734, issued November 16, 1955, the Board eliminated from consideration in the proceeding all applications for service to areas north and west of Chicago. Eastern points out that, under the award here objected to, Northwest, which was previously certificated for service between Minneapolis/St. Paul and Chicago, will now be permitted to conduct direct service between Minneapolis/St. Paul and Miami.[7] Eastern further points out that its application for extension from Chicago to Minneapolis/St. Paul, filed eight years before Northwest's application for Chicago-Miami authority and contemplating exactly the same Miami-Minneapolis St. Paul service as the Board has here awarded Northwest, was not given simultaneous, comparative consideration. Eastern contends that certification of Northwest for Miami-Minneapolis/St. Paul service will as a matter of economic fact preclude certification of Eastern for that same service. Thus Eastern contends that the Board's procedure has violated the *Ashbacker* principle.[8]

---

[7] Pursuant to the Board's consolidation order which denied any successful applicant the right to conduct nonstop flights between "beyond area cities" and points newly authorized in the proceeding. Northwest's flights between Minneapolis/St. Paul and Miami must stop at Chicago. The Board denied Eastern's demand that single-plane flights also be prohibited.

[8] Eastern's *Ashbacker* argument in the *Great Lakes-Southeast Service Case* has been before the courts once previously. Eastern petitioned the Court of Appeals for the District of Columbia to review the Board's consolidation order. The petition was dismissed, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956), on the theory that a consolidation order was not a "final order" for purposes of judicial review. Having dismissed the petition, the court went on to suggest that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings. Eastern quite rightly contends that this decision is not *res judicata* in the present case; and, deciding the case as we do, we need not consider the possible inapplicability of *Ashbacker*.

Ashbacker Radio Corp. v. *FCC*, *supra*, involved two applications for the construction of radio stations. The stations planned to operate at the same frequency and were located in cities less than fifty miles apart. The Federal Communications Commission found that these two applications as a matter of physical fact were mutually exclusive and thereupon granted one application without hearing and relegated the second to a hearing to be held later. The Supreme Court reversed the Commission, holding, as a matter of statutory construction, that two mutually exclusive applications must be granted a concurrent hearing. Although *Ashbacker* dealt only with physical exclusivity its doctrine soon found its way into aeronautical law, and was applied to applications for the same routes which were mutually exclusive "as a matter of economic fact." *Northwest Airlines* v. *CAB* (D. C. Cir. 1952), 194 F. 2d 339; *Delta Air Lines* v. *CAB* (D. C. Cir. 1955), 228 F. 2d 17. See also *Seaboard & Western Airlines* (D. C. Cir. 1949), 181 F. 2d 777; *Western Air Lines* v. *CAB* (9 Cir. 1950), 184 F. 2d 545.

On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB*, 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented

none.[9] This failure to make any showing of mutual exclusivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made.

Second, Eastern points to three instances that it claims are such departures from orderly administrative procedure as to vitiate the Board's action. Eastern's contentions, which will be discussed in turn, relate to (1) a "press release" announcing the Board's tentative decision and released six months before the Board's opinion; (2) participation by assistants of Board members at Board meetings in which tentative awards were made; (3) receipt by the Board immediately prior to oral argument of alleged *ex parte* representations concerning an equipment program commenced by Capital Airlines, the carrier ultimately awarded authority between the cities of Miami and Cleveland, Pittsburgh and Buffalo.

Pursuant to a policy begun at some time more than two years ago, the Board, approximately two months after the

[9] At the hearing before the examiner Eastern requested that the applicants for the Chicago-Miami route be compelled to produce data on the percentage of occupancy on some of the applicants' flights. The request was denied. Before the Board Eastern argued that this "load factor" data was relevant to mutual exclusivity. However, before the examiner Eastern argued only that this evidence was relevant to the ability of these applicants to improve upon Eastern service, or, in the alternative, to the inadequacy of load factor data as evidence in determining the caliber of existing service.

completion of oral argument, issued a "press release" announcing the route awards it was granting in the *Great Lakes-Southeast Service Case*. The press release expressly stated that the announcement of the awards did not constitute decisions in the case but that decisions would be entered and issued later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion.[10] The awards conferred by the Board's formal opinion, however, coincided exactly with those announced in the previous press release. Eastern claims that in effect this practice amounts to a prejudgment, in that the opinion, written six months subsequently, represents nothing more than a rationalization of conclusions previously reached; and that, therefore, the opinion is a nullity even if otherwise legally sufficient. We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion

[10] The Board's explanation of its press release procedure is enlightening. Because of the complexity of the data presented to it in an area proceeding (see footnote 3, *supra*), the Board has found it necessary to make a preliminary, tentative decision, then to draft an opinion based upon it, and thereafter to take a further and perhaps final vote to accept or reject the decision embodied in the proposed opinion. Prior to the adoption of the press release procedure, the Board says that news of the Board's tentative decision seemed invariably to "leak" to interested outside persons. The stated purpose of the press release, therefore, is to make this information uniformly available to the general public and is an admission by the Board that "leaks" do occur and that the Board is powerless to prevent them.

should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

Eastern objects to two of the Board's subsidiary awards[11] for the reason that at the tentative votes on these awards two assistants to Board members participated in place of their respective superiors.[12] However, leaving aside the fact that these votes were merely tentative, we note that the votes in question were cast only after two days of discussion by the Board when all of its members were present, and that the votes later cast by the assistants were cast in compliance with instructions given by their superiors. Accordingly, we find no improper delegation; and, assuming such right to exist, we find no deprivation of an applicant's right to joint deliberation upon his application by the Board members before vote is had upon it.

Eastern contends that the Board must have considered information in its hands relating to an equipment acquisition program announced by Capital three days prior to commencement of oral argument before the Board as bearing upon the issues here, and therefore Eastern was unfairly prejudiced since this information was not part of the record in the case. More specifically, Eastern objects to Capital's wide circulation of a press release relating to the

[11] These were an award to United to serve Columbus and Dayton on Washington-Chicago flights, and one removing from Northwest all restrictions on that carrier's Washington-Pittsburgh-Cleveland-Detroit route. Eastern had applied for each of the routes which these votes awarded to other carriers.

[12] The award to United was by vote of 4–0, one vote being cast by an assistant. The vote with respect to Northwest was 4–0, two votes being cast by assistants.

equipment program and, branding this an effort to bring improper pressure upon the Board, Eastern demands that the record be reopened to determine Capital's fitness. In addition, Eastern claims that it was unfairly prejudiced because the manufacturer from whom Capital proposed to purchase its equipment communicated to the Board just prior to the beginning of oral argument the details of the proposed purchase. The Board assures us that the decision to award Capital the Miami-Buffalo, Cleveland, Pittsburgh route was uninfluenced by the announcement of Capital's equipment acquisition program. We have no reason to doubt this representation. The communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southest Service Case.*[13] See *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, 730 (D. C. Cir. 1956), *cert. denied*, 352 U. S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F. 2d 418 (D. C. Cir. 1958), is inapposite.

Finally, Eastern contends that, as to the following matters, the Board has failed to make appropriate findings or has failed to support its findings with substantial evidentiary findings: inadequacy of existing service; advantages purported to result from competitive authorizations; sufficiency of various markets to support additional carriers; and insubstantiality of Eastern's loss of revenues resulting from new authorizations.

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[13] Equipment acquisition programs are relevant to a carrier's needs for additional revenue. At the time of the communication to the Board, the Board was conducting a comprehensive investigation of passenger fares. Second, a change in the ownership of Capital, a matter calling for Board approval under Sec. 408 of the Civil Aeronautics Act, 49 U. S. C. A. 488, could possibly result from the financing provisions of the proposed equipment acquisition program.

As to the first two matters, the recent case of *FCC v. RCA Communications*, 346 U. S. 86 (1953), is controlling. The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic.[14] Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence.[15] See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *Colorado Wyoming Gas Co.* v. *FPC*, 324 U. S. 626 (1945).

We have examined Eastern's other contentions and have found them to be without merit.

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[14] "The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certificating a third carrier." *Great Lakes-Southeast Service Case*, E-13024 [R. 15222].

[15] We note further that Eastern introduced no evidence on the issue of diversion, thus failing to sustain the burden required under *Clarke* v. *United States*, 101 F. Supp. 587, 594 (D. D. C., 1951).

CAPITOL

As hereinbefore stated, Capitol was an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes. Capitol's objections to the Board's decision are two: first, the Board failed to make findings concerning Capitol's fitness and the public need for its proposed service; second, the Board erred in allowing additional time at oral argument for statements by Members of Congress, several of whom stated a preference for Northwest, the carrier ultimately selected for the Miami-Chicago route. In connection with the second objection, Capitol has moved that this court appoint a Commissioner or Referee to determine whether Northwest procured the congressional representations, the motion assuming that Northwest initiative in this respect would constitute exertion of undue influence upon the Board by the carrier.

Capitol contends that Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, requires that the Board, when it is confronted with a series of competitive applications, make findings as to whether each applicant is fit, willing and able to supply the service applied for, and as to whether the service proposed by each applicant is required by the public convenience and necessity. Capitol relies upon Section 401(d)(1) of the Act, 49 U. S. C. A. 481(d)(1) which reads as follows:[16]

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and re-

[16] The parties agree that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 U. S. C. A. 1301 *et seq.*

> quirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As we read this section it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previously held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no further findings with respect to the unsuccessful applicants is required. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831; *North American Airlines* v. *CAB*, 241 F. 2d 445, 448 (D. C. Cir. 1957). The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence.[17]

We find no merit in Capitol's contention that congressional representations at oral arguments before the Board in favor of Northwest's application constituted undue influence. We so hold irrespective of whether Northwest actively solicited it. Equally without merit is Capitol's contention that the time consumed in listening to Congressional representations denied Capitol equal time with other applicants for oral argument, or that the failure

[17] Capitol seems to suggest that *American Airlines* v. *CAB*, 235 F. 2d 845 (D. C. Cir. 1956), cert. denied, 355 U. S. 905, and *Pan American-World Airways* v. *CAB*, 261 F. 2d 754 (D. C. Cir. 1958), cert. denied, 359 U. S. 913, have enunciated a more exacting standard for administrative findings of fact. These cases are not applicable here. They merely hold that where the Board permits air operations by exemption under §416(b), 49 U. S. C. A. 496(b), rather than by the more rigorous procedure of certification under §401, 49 U. S. C. A. 481, the Board must give reasons for this short-cut by findings more specific than a mere echoing of statutory language.

to announce in advance that time would be allotted for congressional statements denied it an opportunity to prepare rebuttal and thereby denied it a fair hearing.

City of Nashville

The City of Nashville, Tenessee contends that the Board erred by excluding from consideration the needs of that city for improved air service. The Board's consolidation order[18] set as the westward limit of the geographic area under consideration a line from Chicago to Indianapolis to Louisville to Atlanta (and ultimately to Miami). Subsequently the westward limit was extended to include Chattanooga, Tennessee and Tallahassee, Florida. Nashville lies to the west of this westward limit as amended, and accordingly its service needs were not considered. We do not find that the geographic limits established by the Board were arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions.[19] We find no error here.

Therefore, insofar as the Board's action is challenged by the petitions of Eastern, Capitol, and the City of Nashville, it is affirmed. Capitol's motion to refer certain matters to a Referee or Commissioner is denied.

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[18] Order No. E-9734, issued November 16, 1955.

[19] See note 3, *supra*.

No. 679.

In the

Supreme Court of the United States

October Term, 1959.

TRANS WORLD AIRLINES, INC., *Petitioner*,

vs.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, AND THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, AND THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, AND THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS, *Respondents*.

MEMORANDUM OF RESPONDENT.

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In the

Supreme Court of the United States

October Term, 1959.

No. 679.

TRANS WORLD AIRLINES, INC., *Petitioner*,

vs.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, AND THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, AND THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, AND THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS, *Respondents*.

MEMORANDUM OF RESPONDENT.

Trans World Airlines, Inc., has filed herein its "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" seeking a review of the judgment of that court entered on December 10, 1959, and amended January 7, 1960.

The City of Kansas City, Missouri, while technically a respondent herein, supported in the Court of Appeals for the District of Columbia Circuit, the decision of the respondent, Civil Aeronautics Board, which decision the Court ordered reversed and remanded.

The Civil Aeronautics Board, after extensive proceedings, certificated Trans World Airlines, Inc., between St. Louis and Miami. It is the position of the City of Kansas City, Missouri, that the services made possible by this authorization are of great value to Kansas City and should not be disturbed for the benefit of remote private interests that can offer no comparable service to this important community. It is further the position of Kansas City that it should not be obliged to await the resolution of private conflicts in distant areas of the country before being afforded the improved access to the Southeast that the Board's decision made possible.

For these reasons, respondent, City of Kansas City, Missouri, does not oppose, but, on the contrary, supports the petition for a writ of certiorari filed by Trans World Airlines herein, and hence waives its rights to file a brief in opposition thereto.

Respectfully submitted,

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March 1, 1960.

FILE COPY

No. 679

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*,

vs.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, AND THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, AND THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, AND THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS, *Respondents*.

MEMORANDUM OF RESPONDENTS CITY OF NASHVILLE, TENNESSEE, AND NASHVILLE CHAMBER OF COMMERCE

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In the

Supreme Court of the United States

October Term, 1959

No. 679

TRANS WORLD AIRLINES, INC., *Petitioner*,

vs.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, AND THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, AND THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, AND THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS, *Respondents*.

MEMORANDUM OF RESPONDENTS CITY OF NASHVILLE, TENNESSEE, AND NASHVILLE CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORIARI

The interests of the respondents City of Nashville, Tennessee, and the Nashville Chamber of Commerce are substantially identical with those of the petitioner herein and these respondents support the petition for a writ of

certiorari. Hence no brief in opposition to the petition will be filed on behalf of these respondents.

Respectfully submitted.

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Nos. 670 and 777

In the Supreme Court of the United States

October Term, 1959

Trans World Airlines, Inc., petitioner

v.

Dean Ada Lowry, Etc., et al.

Eastern Air Lines, Inc., petitioner

v.

Capt. Anthony Duff

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 679

TRANS WORLD AIRLINES, INC., PETITIONER

v.

DELTA AIR LINES, INC., ET AL.

No. 777

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

The scope of the decision below [1] and of the grounds on which it rests is not altogether clear. For that reason the Government has not filed a petition for certiorari. If the decision is construed as resting on and restricted to the particular facts involved, review by this Court would not be indicated. On the other

[1] The decision (*Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, C.A.D.C.) (decided December 10, 1959), is set out in Appendix "B" of the petitions filed in both cases, Nos. 679 and 777. For convenience the decision set out at pages B1–B24 of the Appendix to the petition in No. 679 will be utilized throughout this memorandum and is referred to as "B—."

hand, if the Court should agree with petitioners that the decision enunciates general rulings of law as to the implications of the *Ashbacker*[1] rule in relation to route proceedings conducted by the Civil Aeronautics Board which will require substantial and unwarranted alterations in the Board's procedures, review by this Court would be justified. This memorandum sets out the views of the Government on the principal questions presented in the petitions.

1. The major questions raised by the two petitions are those arising out of the application to Civil Aeronautics Board route proceedings of the doctrine enunciated in *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327. The court below reversed an award to Trans World Airlines (TWA) of a route between St. Louis and various Florida points, because it appears to have believed that parties claiming that the grant would be mutually exclusive with their existing services or pending applications had been improperly deprived of a hearing in which to demonstrate such conflict (B14, 16, 20). TWA, petitioner in No. 679, asserts in effect that more was involved and that this decision casts doubt upon the Board's established practices for dealing with these matters. Eastern Air Lines (Eastern), petitioner in No. 777, appears to agree that substantive questions of law were decided and alleges that the court's action with respect to the TWA award (with which it agrees) was inconsistent with its refusal to take similar action with respect to an award made in the same

[1] *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327.

proceeding to Delta Air Lines (Delta) to fly between Memphis and Birmingham.

In view of the complex and widespread nature of the existing route structures of the various certificated airlines and the large number of applications for new or extended routes which such carriers normally have on file with the Board at any given time, serious procedural problems are involved in complying with the *Ashbacker* rule. If the grant of one application will require the denial of another, a comparative hearing before the Board is clearly required. *Northwest Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A.D.C.); cf. *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572.[3] A more difficult problem is raised, however, where there is an allegation that a particular application may be in conflict with another application for service between other points. A somewhat similar question may be raised where an application to provide service between two points is alleged to conflict, because of the economic impact of any grant, with existing service between two other points.

To avoid a chain reaction which would result in practically all trunk-line applications throughout the United States being consolidated with one another, the Board has adopted a policy of attempting to delimit the areas within which it will consolidate for hearing competing applications for new or extended routes.

[3] In the aviation field, the mutual exclusivity is not one of electrical interference, as in *Ashbacker*, but instead results from the economic limitations on the number of carriers which can be certificated to provide particular service requirements.

But such limitation does not resolve the question since a grant of a route within a defined area not only authorizes a carrier to provide service over that route, but, by a so-called "tacking" procedure, to combine the new route with existing routes for which the carrier is already certificated, thus making possible flights between points outside the area to which the hearing was confined and points newly certificated within the area.[4] To take care of these problems the Board has adopted a policy, approved by the courts of appeals,[5] under which it makes an informed preliminary determination as to

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[4] See *Frontier Airlines* v. *Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). The court below expressly relied upon *Frontier* as support for the proposition that in making an award "in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors" (B15, see also B24). And while the decision below contains language indicating that "evidence and findings" were required "if a transcontinental award was to be made" (B15) we do not construe this statement as necessarily proscribing any combinations of old and new routes in the absence of a positive Board finding that the public convenience and necessity so requires. We believe the court language, in context, was merely referring to the alleged lack of notice which "entitled" the interchange carriers "to a hearing on the possible existence of mutual exclusivity" (B16), rather than a rejection of the normal transportation rule, followed by the Board here and in all other cases, that a carrier is allowed to "tack" or combine old and new authorizations unless there are affirmative public interest reasons to the contrary. See, *e.g.*, *M. I. O'Boyle & Son* v. *Interstate Commerce Commission*, 206 F. 2d 473 (C.A.D.C.); *Aero Mayflower Transit Co.* v. *United States*, 95 F. Supp. 258 (D. Neb.).

[5] *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F. 2d 13 (C.A.D.C.); *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752 (C.A. 2), petition for writ of certiorari pending, case No. 785, this Term.

the validity of claims of mutual exclusivity. If it finds the claim to be prima facie correct, it either consolidates the two applications for comparative hearing or states it will condition the grant of any certificate issued to avoid the conflict by the imposition of stop or change-of-plane requirements, or by restricting or precluding carrier operation between specified intermediate points on the proposed routes. Under this procedure, in any case where it does not initially consolidate the allegedly conflicting applications or impose all restrictions requested, the Board provides in its hearing order that the parties claiming that mutual exclusivity will nonetheless exist will have a full opportunity to establish in the hearing that the granting of one or more of the applications would as a matter of economic fact preclude the grant of an application or applications that the Board has refused to consolidate. See *National Airlines* v. *Civil Aeronautics Board*, 249 F. 2d 13 (C.A.D.C.).

In the present case there were allegations that grant of TWA's application, because of its ability to "tack" service on existing routes between the West Coast and St. Louis to any St. Louis to Florida route it might secure, would conflict with an existing interchange service between the West Coast and Florida conducted jointly by National, Delta, and American, and also with pending applications (by these latter three airlines among others) for West Coast to Florida service along a Southern Transcontinental route through points in Texas and Louisiana. In addition,

Eastern alleged that both the TWA application and an application by Delta for service between Memphis and Birmingham would, because of their existing routes to the west of St. Louis and Memphis respectively, conflict with applications which Eastern had filed to extend its comprehensive existing service in the southeast westward from St. Louis and Memphis to the Pacific Coast and Kansas City. The Board, upon study of the pleadings, concluded that a conflict between TWA grant and the other services and applications might in fact exist.* To obviate this difficulty and at the same time preclude a general expansion of the already complex hearing, the Board specified that any new flights originated or terminated to the west of St. Louis would have to "be operated with, as a minimum, a scheduled stop at St. Louis" (J.A. 98). It also expressly stated that the parties to the hearing would be free to "advance at the hearing appropriate material bearing on the need for more stringent limitations" (J.A. 98, see, also, J.A. 93).

At the hearing evidence was introduced with respect to the effect of a TWA grant upon the existing southwest to Florida interchange service (see, *e.g.*, J.A. 208–211, 229–234) but no evidence was offered with respect to the effect of the grant upon the applications in the pending Southern Transcontinental case or in support of Eastern's claim as to the mutual exclusivity of its westward applications with those

* It reached no such conclusion with respect to the Delta application to extend its service from Memphis to Birmingham, but in any event required a stop at Memphis by Delta.

of either TWA or Delta. The Board in its decision awarding the grant to TWA (J.A. 500–501) considered the evidence introduced as to the impact of such an award upon interchange service (J.A. 494–496). Concluding that this impact would not be "so great as to require the denial to the traveling public of the service benefits accruing from the through-plane service via St. Louis proposed by TWA," it refused to impose any restriction, in addition to the one-stop restriction on that route (J.A. 496). And, while no evidence had been introduced on the matter, the Board went on to state (J.A. 497) that TWA service via St. Louis "would not in any real sense preclude a finding of public need for a more direct routing" in the Southern Transcontinental case. In petitions for rehearing, American, Delta, and National stressed the alleged conflict between the TWA grant and the applications in the Southern Transcontinental case. And Eastern in its petition for rehearing alleged for the first time facts purporting to show the inconsistency between the TWA and Delta grants and the grant of its own application for service west of St. Louis and Memphis. The Board rejected these claims as coming too late since they had not been established "at the hearing stage" (J.A. 646). It also rejected the claims of mutual exclusivity on their merits (J.A. 646–647, 651–652).

The court of appeals reversed, insofar as the claims of American, Delta, and National with respect to the Southern Transcontinental case and the interchange service were concerned, on grounds that allegations of

mutual exclusivity had been sufficient to warrant "a hearing on the possible existence of mutual exclusivity" (B16). Despite the express statement in the Board's hearing order affording just such a right to introduce evidence to the petitioners below (see p. 6, *supra*), and the fact that evidence had been introduced on the effect of a TWA award upon the interchange service, the court appears to have held that the Board had led the petitioners to believe that the transcontinental aspects of any TWA award was not in issue in the case—apparently because of the Board's refusal to broaden the proceeding to cover service between St. Louis and the West Coast. (B12–13, 14).

We think this determination of the court as to the lack of notice of the nature of the proceedings or the availability of the hearing to introduce evidence as to mutual exclusivity despite the St. Louis stop requirement was based on an erroneous reading of the record; its invalidity is emphasized by the fact that the court, in that part of the decision discussing Eastern's claims, refers (B20) to Eastern's "awareness that the issue of mutual exclusivity was open to it during all stages of the hearing * * *." But despite a reference by the court (B20) to its earlier decision in *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F. 2d 17 (C.A.D.C.),[7] we do not construe the decision as

[7] The earlier *Delta* case held, with respect to alleged conflicting applications *within* the general area under consideration in a Board proceeding, that the Board must either consolidate the applications for which a substantial claim of exclusivity is asserted or first make preliminary findings of non-exclusivity after separate hearings on that issue. The decision in this case was on a Motion for Stay and the subsequent mooting of the

requiring any departure from the Board procedures approved by the same court two years previously in the *National Airlines* case, *supra*—a case not mentioned in the decision here—and the Board may well be able to avoid the impact of the case by specifying its practice with even greater particularity in future cases.

Moreover, if the decision here is deemed to rest on the notice point, there is no necessary conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Eastern Air Lines* v. *Civil Aeronautics Board, supra.* The court here (1320) appears to be stating that although Eastern (which it concluded was on notice of its rights to introduce evidence as to mutual exclusivity) did not avail itself of the opportunity to offer evidence in support of its claim at the hearing, it had cured this defect by "refer[ring] to some facts on which it relied to show mutual exclusivity" in its petition for reconsideration (*ibid.*). The Court of Appeals for the Second Circuit, on the other hand, expressly held that a similar failure of Eastern to present evidence as to mutual exclusivity at the hearing in the proceeding there "* * * is fatal to Eastern's *Ashbacker* contentions * * * We hold that in an area proceeding where an applicant objects to exclusion of his application by a

case before final decision precluded an application for further review. The procedures therein indicated by the court have in fact not been followed by the Board, which has instead applied the procedures approved in *National* to cases involving allegedly conflicting applications both within and without the delimited area of a Board proceeding.

consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made" (271 F. 2d 752, at 757). We think the decision of the Second Circuit on this matter is clearly correct. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 526–527 (see the Board's brief in opposition in No. 785). But since we do not read the opinion below as necessarily holding that the Board must consider allegations of mutual exclusivity raised for the first time on reconsideration where the Board makes it explicit that evidence thereon would be considered only to the extent it is adduced at the earlier hearing, it would appear that the problem can be resolved in that way.

2. Eastern objects (Pet. 777, pp. 19–24) to the distinction drawn by the court between its claim of mutual exclusivity with respect to the TWA grant (which the court honored at least to the extent of requiring further findings, B20) and its similar claims with respect to the Delta grant to fly between Memphis and Birmingham (which the court rejected, B20–22). We agree that Eastern's procedural rights are the same whether the alleged conflict is between applications for transcontinental service or between routes covering smaller distances (here in essence the routes between Kansas City and Florida points). But, unlike Eastern, we do not regard the court's opinion as necessarily establishing any procedural double standard dependent upon the court's evaluation of the geographical extent of the alleged conflict. Instead, the court's language (B21) distinguishing between "adding a little additional segment outside the

area" from "awarding a transcontinental certificate in a limited area case" appears to have been directed towards the quite different question of whether the Board, in delimiting the area within which it would consider applications, properly excluded Eastern's Kansas City to Memphis application. For the conclusion the court reaches on the basis of the distinction between the two situations is merely that "the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment" (*ibid.*). The reason the court gave for rejecting Eastern's claim of conflict between its out-of-area application and the Delta application for service between Memphis and Birmingham, is that the resulting Delta route between Kansas City and Florida, through Memphis and Birmingham, would be merely "one of many combinations of routes available to Eastern from Kansas City to Southeast points" and that "to consider this one route separately would be to [improperly] require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications" (B22). We think this determination is an obviously correct one.

3. Eastern argues (Pet. 777, pp. 12–17) that the Board's determination that additional service, competitive with that already furnished by Eastern, was necessary on the routes awarded TWA and Delta was erroneous because the Board failed to "make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity" in the markets involved (*Id.* at 2). Its position appears

to be that unless the Board makes these precise dollars and cents forecasts in determining that competition over the routes in question is economically feasible, it cannot make an informed "judgment" that the making available of such competition will serve the public convenience and necessity. See *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86. We think the court below was clearly correct in finding "these contentions to be without merit" (B22–23) in the light of "findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area" (B23).

The Board must, of course, consider the economic feasibility and impact of competition, and reasonable estimates by the parties are valuable and are taken into account in this respect. As the court indicated, however, full consideration was afforded here both to the question of economic feasibility and the submissions of the parties, and numerous findings were made by the Board.* But while the Board must find with

* The Board, among other things, set forth the 1957 data in relation to traffic moving between St. Louis and the Southwest and intercity traffic moving along the route (J.A. 486–487) and predicated growth therein (J.A. 487). The examiner found that Delta's traffic estimates were in general accord with established methods of computing such matters; he generally accepted them (J.A. 381); and the Board adopted the examiner's findings (J.A. 485–486). The Board further found that "the record amply demonstrates that the operations of a second carrier can be economically supported without adverse effect on existing

sufficient clarity that the competition is in the public interest after consideration of all relevant data of record, there is no ritualistic formula for setting out the required findings as Eastern contends. On the contrary, it has long been recognized that prediction of future traffic and costs is not an exact science, that the Board need not make future projections in these areas with mathematical precision (*American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.)), and that its basic findings need be made only "with sufficient elaboration to enable the court to relate the evidence to them." *Lake Central Airlines* v. *Civil Aeronautics Board*, 239 F. 2d 46, 49 (C.A.D.C.). The Board was not required to withhold certification because Eastern having been found deficient in the past now promised more service. *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86, 96–97; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 69, 70; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514–515. The Board having considered and discussed

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carriers" (J.A. 487), and the examiner's report sets forth the various cost and revenue estimates of the applicants, including those of TWA (J.A. 351–357), which obviously were accepted as being within the zone of reasonableness. There was a dollar estimate of diversionary effect on Eastern (J.A. 655), together with findings that the diversion would not injure Eastern and also that the traffic growth would tend to sustain Eastern's revenues despite a reduction in its percentage participation in the market (*id.*). As to the Delta award, the Board found service deficiencies which could be remedied with "negligible" impact on Eastern in the light of various restrictions imposed on the award (J.A. 655), and again there were cost and traffic estimates submitted by Delta (J.A. 332–343).

all pertinent economic issues, the law requires no more. See, *e.g., Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 193; *Norfolk Southern Bus Corp.* v. *United States,* 96 F. Supp. 756 (E.D. Va.), affirmed, 340 U.S. 802.

4. Eastern's final reason for seeking certiorari—the alleged invalidity of the Board's practice of publicly announcing its tentative vote in major proceedings at the time it gives instructions to the staff to prepare a decision in accordance therewith (Pet. 777, pp. 24–31)—clearly presents no matter warranting review here. The Board, in order to prevent "leaks" as to the nature of its proposed actions to some of the interested parties therein, has followed this practice since 1956. See CAB Order No. E–10884 in the *New York-Florida Case* (decided December 21, 1956) 24 CAB ——. As the Court of Appeals for the Second Circuit stated in rejecting a similar claim in *Eastern Air Lines* v. *Civil Aeronautics Board,* 271 F. 2d 752, at 758:

> * * * Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

Th Court of Appeals for the District of Columbia Circuit in the instant case agreed—not even finding it necessary to comment on the Eastern contentions. The suggestion that a tentative vote prior to drafting the final decision in a case precludes or in any way prejudices the ability of a Board member to reach a different conclusion subsequently is obviously unsound. And the inhibiting effect of a public announcement by the Board itself as to the tentative vote obviously is no greater than where such vote becomes known throughout the trade through unofficial trade sources.*

Respectfully submitted.

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* Thus, in the *Seven States Area Case*, CAB Order No. 13254, decided December 8, 1958, petition for review pending, *North Central Airlines* v. *Civil Aeronautics Board* (C.A.D.C., Case No. 14947), the Board by a press release of May 19, 1958 announced its tentative vote to award a route to Ozark Air Lines, but in its final decision awarded the route to North Central Airlines.

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Nos. 679 and 777

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IN THE

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OCTOBER TERM, 1959.

TRANS WORLD AIRLINES, INC., *Petitioner*,

v. No. 679

DELTA AIR LINES, INC., *et al.*, *Respondents*.

EASTERN AIR LINES, INC., *Petitioner*,

v. No. 777

CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

TRANS WORLD AIRLINES, INC., *Petitioner*, v. DELTA AIR LINES, INC., *et al.*, *Respondents*.	No. 679
EASTERN AIR LINES, INC., *Petitioner*, v. CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.	No. 777

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

The Court has before it two petitions for a writ of certiorari to review the same judgment of the United States Court of Appeals for the District of Columbia Circuit. One of them (No. 679) urges that the court below went much too far in its decision invalidating a route award by the Civil Aeronautics Board. The

other (No. 777) urges that the court did not go nearly far enough. These circumstances alone will tempt the Court to conclude what a brief analysis of the proceeding will clearly demonstrate: that the decision of the court below is entirely correct and that no proper ground exists for this Court's exercise of its certiorari jurisdiction.

COUNTERSTATEMENT OF THE CASE

American Airlines' interest in this proceeding is limited to its interest in southern transcontinental (*i.e.*, California to Florida and Georgia) air service. American is presently licensed to participate in the only through air services in these markets that the Civil Aeronautics Board has found required by the public convenience and necessity, the "southern transcontinental interchanges."[1] These operations provide through-plane California-Georgia service over the routes of American and Delta Air Lines with a required stop at Dallas,[2] and through-plane California-Florida service over the routes of American, Delta and National Airlines, with required stops at Dallas and New Orleans.[3] In addition, American is (and has been for almost four years) an applicant for extension of its California-Texas route into Georgia and Florida, for the provision of single-carrier (*i.e.*, one-airline) south-

[1] Southern Service to the West Case, 12 C.A.B. 518, 540-43 (1951).

[2] This interchange operates over American's route from Los Angeles and San Francisco to Dallas and over Delta's route from Dallas to Atlanta.

[3] This interchange operates over American's route from Los Angeles and San Francisco to Dallas, over Delta's route from Dallas to New Orleans, and over National's route from New Orleans to Tampa and Miami.

ern transcontinental service. This application is now being heard in the *Southern Transcontinental Service Case*, currently pending before a hearing examiner of the Board.

The Board instituted the *St. Louis-Southeast Service Case* in 1956 as a limited-area proceeding to be concerned solely with the need for improved air service within the area between St. Louis and points in Florida and Georgia. A number of airlines (although not American) sought consolidation therein of their applications for a St. Louis-Southeast route, which up to that time had been operated on a monopoly basis by Eastern Air Lines. Trans World Airlines moved for consolidation of an application to extend its California-St. Louis route into Georgia and Florida. Because of the possible impact of such an authorization on its interest (as both licensee and applicant) in southern transcontinental service, American intervened and urged that the Board, by appropriate restrictions on any award to be made, prevent the injection of new southern transcontinental service issues into the limited-area proceeding.

A number of efforts in addition to Trans World's were made to expand the case. In setting forth the issues to be litigated, the Board emphasized its firm intention that there be *no* expansion in the limited, regional scope of the proceeding. It recognized that the only practical alternative to such expansion was to guarantee that it would not authorize, between points within the defined area of the case and points outside, effective new service prejudicial to interests not being heard because of the limited scope. It therefore imposed as a minimum a required stop at St. Louis on any award to be made, and it placed in issue the ques-

tion of whether a more stringent restriction was necessary adequately to protect unheard interests. Having offered this protection to interests outside the limited scope of the case, it refrained from placing in issue either "mutual exclusivity" (*i.e.*, whether the grant of an application being heard would preclude the grant of any not being heard) or the question of whether the duplication of existing services not wholly within the area was required by the public convenience and necessity. American participated in the *St. Louis-Southeast* hearings (held in the fall of 1956) for the sole purpose of demonstrating that an award to Trans World, subject only to a mandatory stop at St. Louis, would be an effective (and thus prejudicial) southern transcontinental authorization, and that a more stringent restriction must therefore be imposed.

Two years later a divided (3-2) Board issued its decision in the *St. Louis-Southeast* case. The majority found service additional to that provided by Eastern between St. Louis and Florida Georgia required by the public convenience and necessity. Notwithstanding the Board's prior assurance that no effective beyond-area service would be authorized, the majority awarded Trans World a St. Louis-Miami extension (with no additional restriction) *because* Trans World could thereby provide effective southern transcontinental service; however, it expressly declined to find such a service required by the public convenience and necessity. In seeking reconsideration, American, Delta and National urged that the award to Trans World, unless restricted to preclude effective California-Southeast through service, would deprive them of a hearing on the issues of (1) the possible mutual exclusivity of their unheard southern transcontinental applications

and (2) whether the duplication of their licensed southern transcontinental services was required by the public convenience and necessity. In response, the majority refused either to limit the award to Trans World or to grant a hearing on the new issues raised by the grant of effective southern transcontinental authority.

The Board also, unanimously, made an award of Memphis-Birmingham authority to Delta. To preclude Delta from providing effective Kansas City-Southeast service by virtue of this award, the Board imposed a restriction requiring three stops between Kansas City and Florida; the Board found that, as restricted, the Delta award did not authorize effective through Kansas City-Southeast service.

On petition for review, the United States Court of Appeals for the District of Columbia Circuit, speaking unanimously through Chief Judge Prettyman, reversed and remanded the Trans World award. It upheld the Board's finding that additional service was required between St. Louis and the Southeast. However, it found that the Board, by strictly limiting the proceeding to issues of St. Louis-Southeast service and the protective restrictions necessary to maintain that limited scope, had excluded issues of new southern transcontinental service from the proceeding. Therefore, when the Board made what it conceded was a grant of effective southern transcontinental authority to Trans World, it had denied the parties the notice, hearing and findings to which they were entitled on the questions (1) whether such an award precluded the grant of pending southern transcontinental applications and (2) whether the duplication of existing licensed operations by such an award was in the public interest. The

court further found that the evidence American had advanced in support of its request for an adequate protective restriction established, at least *prima facie*, that the award to Trans World, subject only to a St. Louis stop, *would* preclude the grant of applications in the *Southern Transcontinental* case and that its impact on the licensed interchanges *did* raise doubts as to whether such a duplication of services is in the public interest.

The court left it to the Board to determine what course of action would be most appropriate upon remand, including (but not limited to) the imposition on the Trans World award of a restriction that would preclude effective southern transcontinental service, or the holding of a full evidentiary hearing on the questions of mutual exclusivity of unheard southern transcontinental applications and the public interest in duplication of licensed southern transcontinental services. The court also (1) asked the Board to clarify its findings concerning certain claims of mutual exclusivity by Eastern, (2) held that those claims would, if valid, be automatically disposed of by the Board's action, pursuant to the court's remand, on the claims of American, Delta and National, and (3) affirmed the Board's limited award of Memphis-Birmingham authority to Delta.

None of the parties, including the Board, sought rehearing or clarification of the court's decision and opinion. Trans World seeks a writ of certiorari to contest the court's invalidation of the award of effective southern transcontinental authority to Trans World (No. 679). Eastern seeks a writ of certiorari to contest the court's failure to reject the finding of a need for competition to Eastern in the St. Louis-

Southeast market, and its failure to invalidate the Memphis-Birmingham award to Delta (No. 777).[4] The Government (acting for the Board) has not petitioned for a writ of certiorari.

ARGUMENT

I. The decision below is clearly correct

No matter how many times and in how many ways the petitioners state their arguments, it is plain that they are asking this Court to exercise its certiorari jurisdiction for no other reason than that they believe the decision below was wrong. Even if there were any substance to these contentions, no proper ground for the issuance of the writ would have been asserted. For it is well established that the certiorari jurisdiction was not conferred simply for the correction of errors in lower court decisions.[5] But in fact the petitioners' extravagant allegations of error are entirely without merit.

Any attack on the decision below must overcome a strong presumption of validity. The opinion of the Court of Appeals for the District of Columbia Circuit (well recognized as the Court of Appeals best qualified in matters of administrative law) is an exceptionally thorough and well-supported analysis of the problem presented and of the means for resolving it. It was rendered unanimously by a distinguished panel—Chief

[4] Eastern's petition is also obviously designed to enhance its efforts to obtain review in No. 785 (in which it attacks a Second Circuit decision upholding the Board in another case) on the ground of an alleged conflict with the instant case.

[5] See, *e.g.*, Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923); Address of Chief Justice Vinson to the American Bar Ass'n, 69 Sup. Ct. V, VI-VII (1949).

Judge Prettyman and Circuit Judges Bazelon and Fahy—unsurpassed on the federal bench in ability and experience in dealing with agency procedures, especially in the field of aviation law.[6] It cannot be lightly supposed that there is any proper basis for reviewing a decision with such credentials, particularly when no party sought rehearing and the Government itself has not asked for certiorari.

The criticisms the petitioners level at the opinion of the court below largely center on alleged "inconsistencies"—internal inconsistencies and inconsistencies with subsequently disclosed facts, both of which are said to demonstrate error in the court's judgment. The internal inconsistency alleged by both petitioners (pp. 21-22 of petition in No. 679; pp. 20-22 of petition in No. 777) is the failure of the court to overturn the limited Memphis-Birmingham award giving Delta alleged beyond-area (Kansas City-Southeast) authority, while invalidating an award giving Trans World effective beyond-area (California-Southeast) authority.

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[6] For example, Chief Judge Prettyman wrote for the court in Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F.2d 777 (D.C. Cir. 1949), National Airlines, Inc. v. Civil Aeronautics Board, 249 F.2d 13 (D.C. Cir. 1957), and Frontier Airlines, Inc. v. Civil Aeronautics Board, 259 F.2d 808 (D.C. Cir. 1958); he was senior member of the panel that issued the *per curiam* opinion in Delta Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); and he was a member of the panels that rendered Eastern Air Lines, Inc. v. Civil Aeronautics Board, 178 F.2d 726 (D.C. Cir. 1949), Eastern Air Lines, Inc. v. Civil Aeronautics Board, 243 F.2d 607 (D.C. Cir. 1956), and Eastern Air Lines, Inc. v. Civil Aeronautics Board, 247 F.2d 562 (D.C. Cir. 1957). Judge Fahy was a member of the panels that rendered Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F.2d 339 (D.C. Cir. 1952), United Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 13 (D.C. Cir. 1955), Eastern Air Lines, Inc. v. Civil Aeronautics Board (1956), *supra*, and National Airlines, Inc. v. Civil Aeronautics Board, *supra*.

The rationale of the court's decision is that, the Board having assured the parties it would not award effective beyond-area authority, it could not then award such authority without providing parties substantially affected thereby with adequate notice and hearing. The difference between the Trans World and Delta awards is quite simply that the former entails *effective* beyond-area authority, but the latter does not. As the court points out, the Board *based* its award to Trans World on the effectiveness of a one-stop California-Southeast operation (Opinion, pp. B5-B6),[7] while it found that the heavily restricted Delta award was not an effective Kansas City-Southeast service (Opinion, p. B21).[8] As restricted, the Delta award, unlike the Trans World award, was plainly within the limited scope of the proceeding, so there was no denial of notice and hearing. Nor was such a denial ever alleged by any party.

Trans World (pp. 16-17 of petition in No. 679) urges that subsequent facts have given the lie to the court's finding of probable prejudice to American and others. The "Actual Facts" alleged by Trans World with respect to the impact of its award on the interchanges and on applications in the *Southern Transcontinental*

[7] (All citations to the opinion of the court below are to Appendix B of the petition in No. 679.) In fact Trans World does operate a daily one-stop jet round trip between Miami and Los Angeles via St. Louis (Official Airline Guide, April 1960).

[8] See p. 5, *supra*. Corroboration of this finding by the Board lies in the fact that Delta now offers *no* through service between Kansas City and Florida (Official Airline Guide, April 1960). Eastern (under the Board-approved Braniff-Eastern interchange via St. Louis) is authorized to provide one-stop through-plane service between Kansas City and Miami, and in fact it does provide through-plane (albeit multi-stop) service between those two points (*ibid.*).

case are characterized by such distortion and omission as to present a totally false picture. There is nothing to be gained by trying that issue to this Court with statements and counterstatements concerning what facts outside the record allegedly show. The place for Trans World to marshal such facts (and for American to refute them) is in the hearing on mutual exclusivity and impact on licensed operations that, as the court below held, the parties have up to now been denied.

II. No "CLARIFICATION" OF THE LAW IS NEEDED

Fifteen years ago this Court placed its imprimatur on the principle of federal administrative procedure that from that time has been known as the *Ashbacker* doctrine, although it had long been an established rule of agency conduct.[9] The doctrine is simply an articulation of a fundamental rule of fair hearing—that where the grant of one application for license authority would preclude the grant of another concurrently pending application (*i.e.*, where the two applications are "mutually exclusive"), both must be comparatively heard before either is granted. It is indirectly involved in the instant case in that, as the court below held, one consequence of the Board's failure to give notice that it might make an effective southern transcontinental grant to Trans World was to deprive American and others of a fair opportunity to establish that *their* southern transcontinental applications were mutually exclusive with Trans World's and must therefore be heard comparatively with it.

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[9] Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U.S. 327, 331 n. 5 (1945).

The petitioners assert, as a reason for a grant of the writ, not only that the *Ashbacker* doctrine as applied to air route proceedings is in a state of "intolerable confusion," but that it has been in such a state for more than ten years; the Court is therefore asked "unequivocally [to] explain the law for the guidance of all" (pp. 22, 28 of petition in No. 679; pp. 18, 24 of petition in No. 777). That these contentions are utterly without foundation is perfectly clear from the fact that before the court below the petitioners (and also the Board), far from suggesting that there was any confusion in the application of *Ashbacker* to air route proceedings, argued extensively from the decided cases and found them logical and consistent. What most clearly establishes the disingenuousness of the petitioners' plaints of confusion is the fact that neither of them asked the court below for rehearing or for clarification of its decision.

As a matter of fact, the Civil Aeronautics Board was applying the *Ashbacker* doctrine to air route proceedings long before *Ashbacker* was decided.[10] And when *Ashbacker* was decided, the Board recognized its applicability to air route proceedings before any court made such a suggestion.[11] Over the years the Board has continued to apply the basic principle of fair hear-

[10] See, *e.g.*, Northeast Route Consolidation Case, 6 C.A.B. 541, 544 (1945); Atlantic Seaboard Operation, 4 C.A.B. 633, 634 (1944); Service to Anchorage, 3 C.A.B. 522, 528 (1942).

[11] See West Coast Case, 8 C.A.B. 636, 637-38 (1947); the first aviation court case involving the doctrine (although, it is interesting to note, *Ashbacker* was not cited) was Eastern Air Lines, Inc. v. Civil Aeronautics Board, 178 F.2d 726 (D.C. Cir. 1949), and the first to cite the *Ashbacker* case was Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F.2d 777 (D.C. Cir. 1949).

ing implicit in *Ashbacker* without ever suggesting that it was confused or unduly confined by the applicability of the doctrine to air route proceedings. Indeed, the Board, in the exercise of its discretion, has often gone much further in applying the *Ashbacker* doctrine than any court would require it to do.[12]

During the past twelve years there have been, as petitioners point out (p. 4 of petition in No. 679; p. 18 of petition in No. 777), a number of air route cases involving the *Ashbacker* doctrine in the Courts of Appeals, principally the District of Columbia Circuit—twelve of them, to be exact, other than the instant case. This fact, however, rather than being symptomatic of confusion in the area, is nothing more than a tribute to the perseverance of disappointed air carriers. Seven of these twelve cases sought interlocutory review of Board consolidation orders setting up route proceedings; of the seven, six were summarily dismissed[13] and the other was eventually dismissed at the request of

[12] For example, in the Southeastern Area Local Service Case, C.A.B. Order No. E-14754, December 18, 1959, pp. 16-19, where mutual exclusivity was fully and squarely in issue; the Board applied the *Ashbacker* doctrine on behalf of a carrier that had presented no evidence at all and had not even cross-examined the witnesses of other carriers; the Board found the exclusivity established by the evidence of the parties against which the doctrine was being asserted.

[13] National Airlines, Inc. v. Civil Aeronautics Board, 249 F.2d 13 (D.C. Cir. 1957); Eastern Air Lines, Inc. v. Civil Aeronautics Board, 243 F.2d 607 (D.C. Cir. 1956); United Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 13 (D.C. Cir. 1955); Western Air Lines, Inc. v. Civil Aeronautics Board, 184 F.2d 545 (9th Cir. 1950); Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, note 11, *supra*; Eastern Air Lines, Inc. v. Civil Aeronautics Board, note 11, *supra*.

the Board after a stay had been issued.[14] Of the five remaining cases that went to court after the Board's final decision, the Board was fully sustained in four.[15] The lone instance in which the Board was reversed on an *Ashbacker* question was *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*,[16] and neither the Government nor the airline involved was sufficiently disturbed or confused to ask this Court for a writ of certiorari.

The plain fact is that the Board and (to the limited extent they have been involved) the Courts of Appeals have been eminently successful in adapting a meaningful right to a fair comparative hearing to complex air route cases. Surely the mere fact that *Ashbacker*, a decision arising out of an F.C.C. proceeding, is now cited in C.A.B. cases (although the principle involved has always been adhered to) is no reason for granting a writ of certiorari, although that is what at least one of the petitioners seems to suggest (pp. 3, 22 of petition in No. 679). In the past, the Court has quite sensibly refused such opportunities as it has had to review the

[14] Delta Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); after the court issued a stay, the Board eliminated the areas of claimed prejudice in its proceeding and obtained vacation of the stay and dismissal of the court action.

[15] Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752 (2d Cir. 1959); Frontier Airlines, Inc. v. Civil Aeronautics Board, 259 F.2d 808 (D.C. Cir. 1958); Eastern Air Lines, Inc. v. Civil Aeronautics Board, 247 F.2d 362 (D.C. Cir. 1957); North American Airlines, Inc. v. Civil Aeronautics Board, 241 F.2d 445 (D.C. Cir. 1957).

[16] 194 F.2d 339 (D.C. Cir. 1952). The court held that where there was only enough traffic for one new nonstop operator between two cities, applications for new authority must be given a comparative hearing with an application for removal of a restriction that would allow the applicant to perform the same service.

"extension" of *Ashbacker* to the proceedings of administrative agencies other than the F.C.C.[17]

Having done everything they could to create an illusion of confusion about the application of *Ashbacker* to air route cases, the petitioners then assert that the decision below adds to that confusion and will hamper the Board in its work. The lack of merit in such a contention is immediately apparent from the limited applicability of the court's decision. It is very rarely that the Board goes to the lengths it did in this case to exclude beyond-area considerations from an area proceeding; indeed, we know of no other trunkline route case in recent years where the Board consciously refrained from authorizing the parties to put in evidence on mutual exclusivity[18] but limited them to the issue of what restrictions would be necessary to maintain the narrow scope of the proceeding.

The decision below impinges upon neither the Board's power to conduct limited-area cases nor its power to

[17] For example, certiorari was denied (344 U.S. 818) in Northeastern Gas Transp. Co. v. Federal Power Comm'n, 195 F.2d 872 (3d Cir. 1952); it appears that the sole purpose of the grant of certiorari in Midwestern Gas Transmission Co. v. Federal Power Comm'n, 258 F.2d 660 (D.C. Cir. 1958), was to vacate the judgment and remand the cause for dismissal because of mootness. 358 U.S. 280 (1959).

[18] It should be noted that refraining from putting mutual exclusivity in issue is a definite step toward the maintenance of the most limited possible scope. The reason for this is that allowing parties to prove the mutual exclusivity of their excluded beyond-area applications does have a tendency to expand the case, since much of the evidence on that issue will be the same evidence that would be used in proving that the application should be granted. See, for example, the Board's listing of some of the factors that are involved in mutual exclusivity, in the order from the Dallas to the West Service Case (C.A.B. Docket No. 7596, *et al.*) reprinted at J.A. 785, 789.

make grants of effective transcontinental route authority: all it says is that if the Board wishes to do *both* in the *same* proceeding, it must make its intentions known soon enough that the parties may show how they will be prejudiced, and how the public interest will be affected, by such action. That this is not asking too much of the Board is confirmed by the fact that the Board did not seek rehearing below, bringing to the court's attention any adverse results that might ensue from its decision. And what is even more important, the Government has not asked this Court for a writ of certiorari, as it surely must have done if it believed the decision below should for any reason be reviewed.

Even if it were true that, because of confusion, there was a need to "clarify" or "re-examine" the application of *Ashbacker* to air route cases, the instant case would scarcely be an appropriate vehicle. Any examination of the essentials of the *Ashbacker* doctrine would require the Court to rove far, far beyond the facts of *this* case, for as we have noted, the doctrine is only indirectly involved here. This case asks only whether or not in certain circumstances a party must be allowed *to show its entitlement* to a comparative (*Ashbacker*) hearing; it does not raise the basic *Ashbacker* questions of when a comparative hearing *must be granted* and what kind of hearing qualifies as a "comparative hearing."

Furthermore, this case turns on its own peculiar facts—and very complex facts, at that. The facts establishing the Board's assurances that it would prevent beyond-area prejudice, and the facts establishing *prima facie* beyond-area prejudice, have been thoroughly and knowledgeably canvassed by the experi-

enced court below. This Court has frequently instructed the bar as to the inappropriateness of bringing such cases as this one to the Court,[19] not only because complex procedural and economic facts should be analyzed and determined by those closer to and more familiar with them, but also because any decision by this Court will be of extremely limited applicability.

III. There is no conflict between circuits

Both petitioners urge, with varying degrees of conviction, that the decision below is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*[20] (pp. 4, 20, 24, 26 of petition in No. 679; p. 23 of petition in No. 777). These allegations of conflict are entirely without substance.

The two cases present entirely different issues. The whole point of the decision below is that the Board, by severely limiting the scope of the *St. Louis-Southeast* proceeding, denied affected parties notice and a fair hearing with respect to an effective California-Florida route award. However, we are aware of no claim whatsoever in the *Eastern* case, by Eastern or by any other party, that it was denied any notice or hearing on the possibility that the *Great Lakes-Southeast* case[21] could produce a Minneapolis-Florida award. The Second Circuit's decision plainly shows that Eastern was on

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[19] *E.g.*, National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951); Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 544 (1927).

[20] 271 F.2d 752 (1950); a writ of certiorari to review that proceeding is being sought by Eastern Air Lines, Inc. (No. 785) and Capitol Airways, Inc. (No. 786).

[21] The Board proceeding out of which the *Eastern* case arose.

full notice that it should prove the mutual exclusivity of its Minneapolis application in the *Great Lakes* case; but the decision below plainly shows that American and others were *not* on notice that they should—or would even be permitted to—prove the mutual exclusivity of their California applications in the *St. Louis-Southeast* case.[22] This may suggest conflicting or inconsistent procedures on the part of the Board in different cases, but it certainly does not bear any resemblance to a "conflict between circuits" for purposes of the certiorari jurisdiction.

One thing of which we may be sure is that the court below saw no conflict between its decision and that of the Second Circuit. In order to be absolutely certain that the court below was aware of the Second Circuit decision as it deliberated on the instant case, the Board filed that decision (which had been rendered on October 7, 1959) with the court two full months before the decision in the instant case was issued (on December 10, 1959).[23] The Second Circuit decision having been so pointedly brought to its attention, the court below

[22] Among the circumstances on which the respective courts based these findings were, no doubt, the facts that the Board (1) specifically placed "mutual exclusivity" in issue in the *Great Lakes* case, but did *not* in *St. Louis-Southeast*, and (2) specifically placed in issue more stringent restrictions to confine the scope of the case in the *St. Louis-Southeast* case but did *not* in *Great Lakes*. It is also apparent from the courts' decisions that Eastern produced *no* evidence on mutual exclusivity in *Great Lakes*, but American's evidence of a need for restrictions in *St. Louis-Southeast* did constitute a *prima facie* showing of mutual exclusivity.

[23] See Motion of the Civil Aeronautics Board for Leave to File Relevant Opinion, filed October 12, 1959; see also the *per curiam* order of the court below, October 14, 1959, ordering the opinion filed. The court also, on motion of Eastern, received a copy of Eastern's petition for rehearing in the Second Circuit case.

would surely have discussed, disapproved of, or distinguished that decision if it was in any way inconsistent with the court's careful, well-documented decision in the instant case. And if the parties, including the Board, had genuinely believed there was a conflict, they certainly would have sought rehearing on that point. The simple fact is that the Second Circuit decision has no bearing on the instant case, and there is no conflict between the two.

IV. The decision below rests on an independent, unchallenged ground

The decision below was not limited to the court's holding that American and others were deprived of notice, hearing and findings on the issue of the mutual exclusivity of their southern transcontinental applications. The court below also held that, by excluding beyond-area issues from the limited-area *St. Louis-Southeast* proceeding but then making a grant of effective southern transcontinental authority therein, the Board denied the licensees of the present southern transcontinental operations[24] notice, hearing and findings on the question whether a duplication of the licensed services is in the public interest (Opinion, pp. B15-B16). In so holding, the court was, of course, vindicating the well-recognized, overriding principle that precludes the duplication of an existing license found required by the public convenience and necessity unless such duplication is similarly found required.[25]

[24] *I.e.*, the interchanges conducted by American, Delta and National, described at p. 2, *supra*.

[25] See, *e.g.*, Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86 (1953); Federal Communications Comm'n v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943).

This major, independent arm of the decision below is not involved in any of the "Questions Presented" by the petitioners and remains substantially unchallenged.[26]

Thus, even if the Court should take this case on the so-called *Ashbacker* grounds and should fully perform the extraordinary task asked of it ("unequivocally explain the law [of *Ashbacker*] for the guidance of all"),[27] the proceeding would still have to be remanded to the Board for disposition of the independent matters raised by the decision of the court below that are not seriously challenged here.[28] Moreover, on such a remand, the Board could completely dispose of the case without reaching the *Ashbacker* issues that had been painstakingly resolved by this Court.[29] It is again clear that if the Court is to revisit *Ashbacker*, this case is not an appropriate vehicle for such an expedition.

* * *

[26] The petitioner in No. 777 did not attack it at all, and the petitioner in No. 679 merely asserted in a footnote that the court's holding on this point "appears clearly erroneous" (p. 28 of petition in No. 679).

[27] Petition in No. 777, p. 24.

[28] It would be no answer, of course, that the Court could (after bringing the case up on *Ashbacker* grounds) consider this independent, unchallenged ground; indeed, the possibility of the Court's considering the other ground is an additional reason for denying review. *Cf.* Stern & Gressman, Supreme Court Practice 112-113 (2d ed. 1954).

[29] On the basis of the question raised by the evidence as to the public interest in duplication of the interchanges, the Board could without further hearing impose on the Trans World award a restriction sufficient to eliminate that question (see Opinion, p. B14); or the Board might hold a hearing on that question alone and find that the public interest would be adversely affected by such duplication (Opinion, pp. B14, B15-B16). In either event the so-called *Ashbacker* issue would not be reached.

One further matter deserves brief attention. The petitioner in No. 679 has asserted that as a result of the decision below "St. Louis would be deprived of needed service to the Southeast" (p. 27 of petition in No. 679; see also *id.* at p. 5). This is simply not so. The court below sustained the Board's finding that the public convenience and necessity require the certification of additional service between St. Louis and Florida, and it sustained the Board's selection of Trans World to operate *that* service (Opinion, pp. B22-B24). The only aspect of the Trans World award of which the court below disapproved was the absence of a restriction against the provision of through southern transcontinental service—a service that the Board expressly refrained from finding required by the public convenience and necessity[30] and a service that the court found *prima facie* prejudicial to unheard interests. There is nothing, absolutely nothing, in the court's opinion to prevent the Board from permitting Trans World to provide, without any delay whatsoever, service between St. Louis and Florida—the only service that has been found required by the public convenience and necessity.[31] Indeed, the court suggested such a course as among those the Board might follow on remand (Opinion, p. B14). This Court should not be misled into supposing that the public interest will be in any way adversely affected by a denial of the writ of certiorari.

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[30] See J.A. 495, 496.

[31] The Board could accomplish this either by amending Trans World's certificate to impose a restriction against through southern transcontinental service or by authorizing local St. Louis-Southeast service by an exemption, as provided for in § 416(b) of the Federal Aviation Act, 72 Stat. 731, 771 (1958), 49 U.S.C. § 1386(b).

CONCLUSION

These petitions for a writ of certiorari state no proper ground for this Court's exercise of its discretionary jurisdiction.[32] Their filing has served no other purpose than to prolong the injury being wrought upon American, its interchange partners and the public interest by the invalid award of southern transcontinental authority to Trans World. American urges that the petitions be summarily denied.

Respectfully submitted,

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April 8, 1960

[32] We do not discuss points I and III of the petition in No. 777, although we do not believe they state adequate reasons for granting the writ. We assume that the Solicitor General will cover these points in his memorandum to the Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*,
v.
DELTA AIR LINES, INC., *et al.*, *Respondents*.
No. 679

EASTERN AIR LINES, INC., *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.
No. 777

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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April 8, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*,
v.
DELTA AIR LINES, INC., *et al.*, *Respondents*. } No. 679

EASTERN AIR LINES, INC., *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*. } No. 777

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITIONS

Delta Air Lines, Inc. (Delta), hereby opposes the petitions for a writ of certiorari of Trans World Airlines, Inc. (TWA), in No. 679[1] and of Eastern Air Lines, Inc. (Eastern), in No. 777.[2] These petitions

[1] References to TWA's petition will be indicated in parentheses by "TWA" followed by the page number, e.g. (TWA 7)

[2] References to Eastern's petition will be indicated in parentheses by "EAL" followed by the page number, e.g. (EAL 7)

are for a writ of certiorari to review the same judgment of the United States Court of Appeals for the District of Columbia Circuit.[3]

COUNTERSTATEMENT OF THE CASE

The case below was based on petitions by Delta and others to review certain orders (J.A. 475, 479, 640) of the Civil Aeronautics Board (Board) in a proceeding known as the *St. Louis-Southeast Service Case* (*St. Louis Case*). In those orders the Board extended TWA's existing California-St. Louis route to Atlanta, Tampa, St. Petersburg and Miami and certificated Delta for a segment from Birmingham to Memphis.

The *St. Louis Case* was originally inaugurated in March 1956 to inquire into the need for service between St. Louis, on the one hand and Florida and other Southeastern points on the other. Despite several requests to expand the area of the case, particularly an attempt by Eastern to include a St. Louis-West Coast application and a Memphis-Kansas City application, the Board refused to expand the case, with the exception of including Memphis within the Southeastern area of the investigation.

At the same time the Board consolidated an application of TWA with respect to its existing Route 2 from the West Coast to St. Louis which sought an extension beyond St. Louis to Nashville, Atlanta, Tampa, St. Petersburg and Miami. Delta and others, including the Board's own Bureau of Air Operations, suggested that a restriction be imposed in the *St. Louis Case*

[3] Citations to the Opinion of the Court below will be to Appendix B to the petition in No. 679, e.g. (B7) References to material in the Joint Appendix will be by page number thereof, e.g. (J.A. 123)

which would prevent TWA from providing a through single-plane service from California to Georgia and Florida in the event TWA's application was granted. Although the Board refused so to restrict the issues *in advance of hearing*, it invited the parties to show a need for a more stringent limitation and clearly indicated its intention to conduct an "area" case and not a transcontinental case. Accordingly, under its application as then consolidated and in the absence of preimposed restriction, TWA could offer single-plane service between San Francisco, Oakland, Los Angeles, Las Vegas, Phoenix, Tucson, Albuquerque and Amarillo, on the one hand (points on TWA's existing Route 2), and Atlanta, Tampa, St. Petersburg and Miami, on the other (points to which TWA requested extension). This is graphically displayed on the map attached hereto as Appendix A.

At about the same time as the commencement of the *St. Louis Case*, the Board instituted a proceeding known as the *Dallas to the West Service Case* (*Dallas Case*) wherein it consolidated an application of Delta for an extension of its existing route system in the South and Southeast to the West from Dallas, via intermediate points, to Los Angeles, San Francisco and Oakland. Accordingly, under its application, Delta, because of its then existing certification to serve points in the Southeast and its proposal in the *Dallas Case* to be extended to Amarillo, Albuquerque, Tucson, Phoenix, Las Vegas, Los Angeles, Oakland and San Francisco, could offer single-plane service between identical pairs of points for which TWA proposed service in the *St. Louis Case* as shown in Appendix A hereto. In the case of TWA a mandatory stop would be required at St. Louis and in the case of Delta a mandatory stop at Dallas.

Both the *St. Louis Case* and the *Dallas Case* proceeded through hearing and initial decision and were briefed and argued to the Board. Subsequently, the *Dallas Case* including Delta's application therein was deferred and consolidated with the then recently inaugurated *Southern Transcontinental Service Case* because of exclusivity issues between the *Dallas Case* and California to Georgia/Florida applications in the *Southern Transcontinental Service Case*, as well as an exercise of administrative discretion (1) in order to retain full freedom to fashion a proper southern transcontinental route pattern and (2) as a matter of desirable procedure to consider all long-haul applications for East-West service in the southern States at the same time. (J.A. 789-90)

Promptly upon deferral of the *Dallas Case*, Delta moved that TWA's application in the *St. Louis Case* be deferred for contemporaneous and comparative consideration with the *Southern Transcontinental Service Case* and the deferred portion of the *Dallas Case*. The Board not only refused to defer TWA's application in the *St. Louis Case* but proceeded to grant it with the attendant right to and *for the reason that* TWA could provide transcontinental service from California to Georgia/Florida with a single required stop at St. Louis in competition with the interchanges hereinafter described.

For many years Delta and American Airlines, Inc. (American), had and even now continue to provide a single-plane interchange service operated by Delta between Atlanta and Dallas and by American from Dallas to California. Similarly, for many years Delta, American and National Airlines, Inc. (National), provided and continue to provide a single-plane inter-

change service operated by National from Florida points to New Orleans, by Delta from New Orleans to Dallas and by American between Dallas and California points. These interchanges were specifically approved by the Board as in the public interest.

Delta requested reconsideration of the Board's action in certificating TWA and pointed out that not only had the Board strictly limited the *St. Louis Case* to an "area" type proceeding but also that its refusal to defer TWA's application constituted a gross and reversible abuse of discretion, in view of the Board's deferral of Delta's application in the *Dallas Case* which would have allowed Delta to provide long-haul single-plane service between 32 identical major city pairs awarded to TWA—albeit with a required stop at Dallas rather than at St. Louis.[4] The Board refused to take affirmative action on Delta's petition for reconsideration.

In the same *St. Louis Case* Delta was certificated to offer service between Birmingham and Memphis, but was severely restricted in that any flight that originated or terminated either at St. Louis or Kansas City (on another of Delta's routes) and which also served a point in Florida, was required to serve Memphis *and* Birmingham *and* Atlanta as well. Eastern objected on the grounds that its Memphis-Kansas City application for a route wholly outside the area was excluded, but the Board found no exclusivity since Eastern's possible unlimited authority would be *so extensive* as compared to Delta's restricted multi-stop operation in limited markets as to avoid any question of exclusivity.

[4] See Appendix A hereto.

Delta petitioned the Court below to review the Orders of the Board which purported to award TWA its St. Louis-Southeast extension on the grounds that the Board had led the parties to believe that it was hearing only an area case but made a transcontinental award; that its refusal to defer consideration of the TWA award in view of its deferral of Delta's substantially similar application in the *Dallas Case* was a gross abuse of discretion; and that it had in fact granted the St. Louis-Southeast route to TWA *because* it could provide effective transcontinental service in competition with the interchanges.[5] Subsequently, American, Eastern and National, in that order, petitioned the Court below to review the same award. In addition, however, Eastern asked the Court to review the certification of Delta.

After briefs and argument, the Court below upheld Delta's, American's and National's contentions as to the TWA award; required additional findings by the Board as to one of Eastern's contentions concerning the TWA award but denied Eastern's remaining contentions thereto; and denied Eastern's contentions concerning the certification of Delta. No party saw any apparent need to request the Court below to clarify or explain its Opinion since no request for reconsideration was filed.

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[5] TWA itself estimated that it would be competitive with the interchanges. Not only did a TWA witness estimate under cross examination that TWA would obtain 50% of the Florida-California traffic but TWA's prepared exhibits so indicate with respect to Miami and Atlanta to Los Angeles and San Francisco. (J.A. 237-238)

ARGUMENT

Both TWA and Eastern attempt to twist and distort the plain language of the Court below to create the impression—if possible—of conflict of decision in support of their respective petitions herein. The opinion, however, is a clear and logical application of the *Ashbacker* doctrine[6] to aviation route cases, as well as being dispositive of other matters and argument.

The Court below discussed the case before it in four major divisions. (B3) The argument herein will be directed to those same divisions since the contentions of TWA and Eastern can thus be most easily discussed.

I. "The Mutual Exclusivity Contentions Advanced by American, Delta and National"

The Court below pointed out that the *St. Louis Case* was designed as an "area" type case to consider the need for service "between St. Louis on the one hand and Florida and other Southeastern points on the other." (B3) Upon consideration of various preliminary motions, some to expand the case to include service to the West Coast from St. Louis and some to impose limitations to prevent a St. Louis-Florida award "from being in effect a through service Florida-California via St. Louis," the Board "limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points." (B4-B5) The Court agreed that the Board cannot be compelled to expand an area case[7] but it also said that the Board

[6] So called and derived from the mutual exclusivity doctrine recited by this Court in *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327, (1945).

[7] In this respect the Court reaffirmed prior decisions in which it upheld the right of the Board to exercise sound discretion in limit-

"cannot hear an area case and, without more make a transcontinental award." (B10) The Court earlier recognized that the Board *had* made a transcontinental award to TWA as reflected in the Board's own opinions and orders.[8]

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ing areas to be considered in route cases." The Court said specifically:

> "It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[8] We now iterate the doctrine there stated: the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine."

> "[8] 100 U.S. App. D.C. 184, 243 F. 2d 607 (1956), cited and quoted in Eastern Air Lines v. Civil Aeronautics Board, 101 U.S. App. D.C. 156, 247 F. 2d 562 (1957)." (B7)

[8] "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, 'operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta-American Interchange, and bring important service benefits to a respectable portion of the passengers moving in these markets.' And in its ruling on a motion for reconsideration the Board said:

> 'The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these "beyond area" benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity.'" (B5-B6)

The question then presented was, as stated by the Court:

> "* * * whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer." (B10)

The Court concluded that a *prima facie* showing of mutual exclusivity *had* been made[9] and that accord-

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[9] TWA attacks the Court's conclusion that a *prima facie* showing was made that an award to it of a California-Georgia/Florida route via St. Louis would make it an *effective competitor* in an *inadequate market*.

First, TWA says that its route via St. Louis is not a southern transcontinental route because "St. Louis is about 400 miles north of the upper limit of this southern transcontinental area." (TWA 9) The fact of the matter is that TWA's route via St. Louis is, for example, only 23 miles longer between Atlanta and San Francisco than Delta's proposed route via Dallas as prosecuted in its *Dallas Case* application which was consolidated into the *Southern Transcontinental Case* as well as the most expeditious routing under the present Delta-American interchange. This mileage differential at present jet aircraft speeds results in a time differential of something less than 3 minutes of flight. Applicable mileage and percentage differentials were called to the Board's attention in Delta's original motion to defer consideration of TWA's application (J.A. 434). Indeed the Board itself minimized the circuity involved in demonstrating that the through southern transcontinental traffic from California to southeast points will be conveniencied by TWA's "Florida-West Coast flights via St. Louis." (J.A. 494) Furthermore, TWA has held itself out to the public as providing *direct, fastest, only one-stop* and *only one-airline* service California to Florida (J.A. 635-638).

Next, TWA argues that "actual facts" demonstrate the markets to be adequate and cites traffic figures for that proposition. (TWA 16)

ingly the case must be remanded to the Board.[10]

Breaking down the 1958 figures to show the average number of passengers per day moving in each direction (i.e. to or from the California cities) there are only 65 passengers between Los Angeles and *all* the named Southeastern cities and a mere 33 passengers between San Francisco and *all* the named Southeastern cities. Taking the largest market alone, (Los Angeles-Miami) there are less than 40 passengers per day each way. The foregoing average daily available passengers should be viewed in light of the fact that present day transcontinental jet aircraft carry 115 or more passengers. Similarly, TWA argues from matters not of record in this case as to the effect of TWA's route via St. Louis on routes directly at issue in the *Southern Transcontinental Service Case*. It would be inappropriate herein to engage in an extended discussion of TWA's allegations since the matters must be considered in context. Nevertheless, this Honorable Court's attention is specifically called to the following testimony of TWA's own witness Cocke, in the *Southern Transcontinental Service Case*, which testimony appears at Transcript pages 11155-56 therein:

> "The Witness: Mr. Gray, I think I would have to say that in my opinion we should oppose an Atlanta-San Francisco carrier.
>
> "By Mr. Gray:
>
> "Q. Why do you oppose an Atlanta-San Francisco carrier and not oppose an Atlanta-Los Angeles carrier?
>
> "A. Only on the basis that I believe Los Angeles generally—if I remember the figures—at least twice as big in traffic as San Francisco. But I am not familiar with the traffic. You are asking my opinion. I am trying to give it to you.
>
> "Q. I want to know the basis as to why you oppose one and not the other. So it is your position that there is not sufficient traffic between Atlanta and San Francisco to allow the certification of Delta in addition to TWA's present operation through St. Louis?
>
> "A. That's right."

Clearly, TWA's attacks on the Court below that a *prima facie* showing of exclusivity are without merit.

[10]The Court did not attempt to dictate the action which the Board should take upon remand but suggested as possible alternatives either a hearing on the mutual exclusivity question alone or imposition of restrictions on TWA. (B14) TWA expresses

TWA urges that the Court below "misunderstood the situation" in connection with its belief that a proper hearing was required on the question of mutual exclusivity of TWA's transcontinental route award. (TWA 17) The facts, however, are to the contrary. The Court recognized that the Board had limited the hearing in the *St. Louis Case* to St. Louis-Southeast service.

The Board, it recognized, imposed the restrictions of a mandatory stop at St. Louis *as a minimum* for any possible California-Florida authorizations. (B5) This was done because the Board was unwilling to impose a through-plane restriction *in advance* as requested by its own Bureau of Air Operations (as well as Delta)[11] but retained the maximum flexibility in connection with such route awards as it might find to be necessary. In short, the Board was unwilling to assume *at the outset* of the case that the record *after* hearing would reflect that an award to TWA would have serious transcontinental implications.

The Court below held only that because the Board clearly had indicated its intention to limit the *St. Louis Case* to an area proceeding, a party need make only a

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concern lest St. Louis be deprived of needed service to the Southeast pending Board review (TWA 27). These are crocodile tears! The Board has ample statutory powers to provide, under proper circumstances, for necessary interim services pending ultimate decision. [Federal Aviation Act of 1958, § 416(b), 72 Stat. 731, 771, 49 U.S.C. 1386(b)] The necessity for such service, however, is a matter of judgment within the peculiar competency of the agency entrusted with the regulatory responsibility. TWA's suggestion would continue the present severe and irreparable injury being suffered by Delta and its interchange partners through diversion of revenues to TWA's illegal southern transcontinental operation.

[11] Consolidation Order E-10304 (J.A. 92-93).

prima facie showing of exclusivity to be entitled either to (1) a full hearing in some proper way on the exclusivity question or (2) protection from exclusivity by the imposition of sufficient restrictions.[12] The Court recognized that the necessary *prima facie* showing of exclusivity was made[13] and, therefore, that the action of the Board violated the rights of Delta and others. Particular note should be taken of the fact that the Court stressed that its remand was based on the lack of affording the parties an *adequate* hearing in view of the Board's refusal to make an "area" award (when the hearing was limited to area issues alone) and was *not* a substitution of its views on whether the facts of record would support a finding of exclusivity. Said the Court: "The right to a hearing is the sole question before us." (B14) The Court was clearly

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[12] In this respect nothing short of a through-plane restriction will suffice. This is a common device employed by the Board to exclude a carrier from competing in a long-haul market in which it is not certificated. For example, the Board precluded Delta from operating a single-plane service between New York and Miami via Atlanta and required an actual physical change of planes at Atlanta. A New York-Miami direct flight covers 1093 miles while a similar flight via Atlanta is 1358 miles or a circuity of 24.2%.

If a service 24.2% more circuitous than a direct service required a change of planes to avoid being competitive, how much more reason there is to require *at the minimum* a change of planes at St. Louis for TWA's operation to and from southeastern points! As was pointed out in Footnote 9, *supra*, the circuity involved in TWA's operation via St. Louis is minimal, particularly when compared to the New York-Miami 24.2% circuity over Atlanta. For example the circuity via St. Louis as compared to the interchange route ranges from a low of 1% in the Atlanta to San Francisco market to a high of 13.5% in the Tampa to Los Angeles market, or an average of only 8.1%. Also, as shown by J.A. 635-638 TWA itself believes that it has a direct competitive route so long as it is only required to make a stop at St. Louis.

[13] See Footnote 9, *supra*.

correct in stating that the Board could not evade the *Ashbacker* doctrine by making a purported finding of lack of exclusivity when exclusivity *as such* was not in issue, and the parties had been led to believe that only "area" routes were in issue.

To summarize, the Court below held that (1) in a limited "area" case, there is in issue the question only of whether other applications are *prima facie* mutually exclusive and (2) if the required *prima facie* showing is made then (a) any route award made in the proceeding must be sufficiently restricted to obviate the exclusivity problem or (b) some sort of expanded hearing on mutual exclusivity must be afforded. In the within case because Delta and others have made a strong *prima facie* showing of mutual exclusivity, further action by the Board on remand is required.

II. "Impact of the Award to TWA on an Existing Southern Transcontinental Interchange Arrangement"

This portion of the Court's opinion is similar to division I in that the Court concurred with Delta and American's argument that the Board did not afford an adequate hearing as to the duplication of the existing interchange services between California and Georgia/Florida. There was not, as the Court indicated, a hearing on "the public interest in a competing southern transcontinental service." (B15) Indeed, in the *Southern Transcontinental Service Case* itself, one of the hotly contested issues is whether there is sufficient traffic across the southern tier of the United States to support the services of more than one carrier!

This alternative ground for the decision of the Court below is not directly challenged in the petitions for

certiorari herein. TWA contents itself with statements that interchange service is less desirable and efficient than single-carrier service in an attempt to enlist sympathy. (TWA 9, 10) But sympathy for TWA not only is misplaced, it is no defense to the charge of lack of adequate hearing. In the *St. Louis Case* there was *no issue* of duplication or replacement of the interchanges—here again one of the specific issues of the *Southern Transcontinental Service Case* is that of termination, replacement or duplication of the interchanges.

The Court's conclusion with respect to this division of its Opinion is similar to division I. In short, the Court said that in the face of a *prima facie* showing of exclusivity with the interchanges, the Board was required either to restrict TWA's award sufficiently to preclude transcontinental implications, or afford Delta and others necessary additional proper hearing.

III. "Eastern's Contentions Concerning Mutual Exclusivity"

The Court below considered Eastern's contentions in a separate division—and rightly so since Eastern's *Ashbacker* contentions are rather novel and not shared by others.[14] A short explanation of Eastern's *Ashbacker* argument should be helpful at this point.

Eastern argues in effect that if carrier A applies for a route segment which will duplicate any existing Eastern route segment, that Eastern is thereby entitled by the *Ashbacker* doctrine to have heard at the same time, *every* application it may wish to make for *all* routes served by carrier A which connect at the com-

[14] Eastern's *Ashbacker* contentions are, of course, colored by the fact that Eastern is attempting to protect monopoly routes from receiving necessary service from other carriers.

mon junction point. The Court below recently had occasion to discuss this theory and commented on it as follows:

> "But it is quite clear that there must be some limitation to the *Ashbacker* rule when applied to air routes. The point is well illustrated in the present proceeding. Eastern has a present route Detroit-Cleveland-Pittsburgh-Miami. Northwest has a present route Pittsburgh-Cleveland-Detroit Minneapolis-Spokane-Seattle. Northwest has filed an application for a route Pittsburgh-Tampa-Miami. It overlaps Eastern's present system and was set for hearing with Eastern's application for additional route segments within that area. Thereupon Eastern filed an application for a route Detroit-Minneapolis-Spokane-Seattle. This application overlaps Northwest's present system. Eastern says its new application is mutually exclusive with Northwest's Pittsburgh-Miami application, because the traffic, and so the competing service, to and from Miami is *through*, not merely to or from Detroit. And in a very real sense this is true. But the same thing would be true of almost any new air-route segment. An application for a segment Washington-Norfolk, by a carrier which already offered service from Washington to points all over the nation, would really involve traffic between all those points and Norfolk. But competing applicants for the Washington-Norfolk segment would not for this reason be entitled to demand comparative consideration with all applicants for certificates from Washington or Norfolk to all other points and by this maneuver translate the proceeding into an examination of the entire national air-route structure. Despite *Ashbacker* it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the *Ashbacker* doctrine is not available for mere tactical maneuver

> purposes. An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so. We think the Board was not unreasonable in this instance."[15]

Returning to the case at hand, the Court below considered Eastern's contentions as to the TWA and Delta awards separately. As to the TWA award it again broke down the argument into two subsections—consideration in connection with (1) an area case and (2) a transcontinental award. (B16) With respect to the former, it noted that Eastern's proposed extension was wholly outside the area of the case and that the Board had full discretion to limit the area and exclude Eastern's request for St. Louis-West Coast authority. (B18)

A different situation, however, obtained with respect to Eastern's St. Louis-West application as part of a southern transcontinental route. The Court noted that on the basis of a southern transcontinental service alone Eastern would appear to be in the same position as American, Delta and National. However, since Eastern's route system to the Northeast as well as its system to the Southeast connected at St. Louis, "Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East." (B19) The Court reasoned that this might well be a valid basis for a determina-

[15] *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board, et al.*, D.C. Cir., 100 App. D.C. 184, 243 F. 2d. 607, 609.

tion of lack of mutual exclusivity but that the Board had not stated its conclusions adequately. The Court said specifically:

> "So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor." (B19)

The Court then commented upon a contention by the Board that Eastern had presented no evidence on the exclusivity question and noted that Eastern had referred in a petition for reconsideration to some facts upon which it relied to establish exclusivity. But, the Court said, the Board did not make the *necessary specific findings* which were required. (B20)

It is at this point that TWA seizes upon language of the Court and shouts "inconsistency". (TWA 18, 19) TWA implies that the Court said that the *full* issue of mutual exclusivity was open to Eastern. What TWA *fails* to do is to read the footnote to that part of the opinion which says in part:

> "However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route."[16]

It is perfectly clear that the mutual exclusivity issue to which the Court was referring in the body of its Opinion was the necessity of Eastern making a *prima facie* showing of exclusivity and the necessity for the Board to make adequate findings with respect thereto.

[16] Footnote 24 to Opinion below (B20).

That this is true is shown conclusively by the Court's language immediately following:

> "In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make *adequate* findings upon the problem of exclusivity, which may *or may not* involve a further hearing." (emphasis added) (B20)

To paraphrase: upon remand the Board may make adequate findings which reflect that *as to Eastern* the TWA award has not been *prima facie* shown to be mutually exclusive. In such a case that ends the matter as to Eastern. If the Board's findings reflect that Eastern *did* make a *prima facie* case then further hearings may be necessary. This is completely consistent with the Court's treatment of the matter in division I of its Opinion.

The claim is also made (TWA 4, 20; EAL 23) that the Court's Opinion somehow conflicts with that of the Second Circuit in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*,[17] 271 F. 2d 752, decided October 7, 1959. That there is *no* conflict is easily demonstrated. In the within case, the Court indicated that there existed matter of record to show exclusivity while in the Second Circuit there apparently was none (C5-C6). Furthermore the parties in the Second Circuit Case were on notice of something more than a limited

[17] The Court's Opinion is set forth in full in Appendix C to the petition in No. 679. References to that opinion herein will be to that Appendix, e.g. (C7)

area case whereas in the St. Louis case the Board went to great extremes to ensure that the parties were aware that *only* a limited area case was being considered. The procedural background of the two cases is not the least comparable. Furthermore, the two cases are consistent since in the *St. Louis* case as limited, the question was one of making a *prima facie* showing of exclusivity. In the Second Circuit case Eastern clearly did not meet whatever burden was on it *in that case*. Furthermore, the opinion of the Second Circuit was filed with the Court below on October 12, 1959, and Eastern's petition for rehearing in the Second Circuit was filed with the Court below on October 26, 1959. Both were received by the Court below, both were before it when it rendered its decision, and the Court obviously saw no need to distinguish the Opinion of the Second Circuit since it was fully consistent with the decision in this case.

Turning next to Eastern's contentions on the certification of Delta between Birmingham and Memphis, the Court acknowledged Eastern's argument that certification would allow Delta to provide a through service from Kansas City to Florida points and that Eastern's Kansas City-Memphis application would have created for it *inter alia* the same service authority. The Court then noted the argument of the Board (1) that consideration of Eastern's Kansas City-Memphis application "would be an unwarranted expansion of the area case," and (2) that the mandatory multi-stop restrictions on Delta's authority were such as to obviate any exclusivity question with respect to possible route extension for Eastern between Kansas City and Memphis with the right to overfly Memphis. (B21)

The Court proceeded to comment on the question of expansion of the area in language which TWA and Eastern again claim shows inconsistency in the Court's opinion. (TWA 21-22, 24; EAL 20-22) And again these contentions are without merit! The Court pointed out that the considerations facing the Board in determining whether to include Eastern's Kansas City application were quite different, and rightly so, from the considerations in determining whether to change the *nature* of an "area" case into a transcontinental case. It then concluded that the Board had the discretion to refuse to expand the area of the case saying:

> "We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment." (B21)

But the Court below did *not* say that *Ashbacker* did not apply. On the contrary it recognized that the certification of Delta between Birmingham and Memphis was highly restricted and noted that Eastern admitted that "the Delta award would not be mutually exclusive with one part of its application" but argued only that it would preclude an identical route with the identical mandatory stops. (B21-B22) The Court pointed out that the extension of Eastern from Memphis to Kansas City would open up a host of route combinations to Eastern and that in such a situation it would be improper to compare only the one highly restricted segment. More specifically the Court said:

> "But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications. We think there is no such re-

quirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system." (B22)

Again the Court was completely consistent. First, the route possibilities inherent in the certification of Delta between Birmingham and Memphis were so severely restricted as to obviate exclusivity problems; and, second, the route combination possibilities inherent in tying in Eastern's system at Memphis with a Memphis-Kansas City extension were such that even Eastern admitted they were not mutually exclusive.

In short, although the Board had the discretion to refuse to expand a limited area case, in the case of the transcontinental award to TWA it had acted completely *inconsistently* and in the case of the highly restricted certification of Delta between Birmingham and Memphis it had acted completely *consistently*, with its limitation of the area.

To summarize the *Ashbacker* situation, the Court below recognized that in the *St. Louis Case* the Board had established and given notice of an "area" case *limited* to the St. Louis-Southeast area. Having done so:

(1) The Board could not without further proper hearings make an effective transcontinental award if it were *prima facie* exclusive of unheard applications;

(2) Delta, American and National had made a showing of *prima facie* exclusivity both with unheard applications and with existing interchange services;

(3) The Board had the discretion to exclude Eastern's St. Louis-West Coast application from the "area" case since it would have transformed the nature of the case from an area case to a transcontinental case;

(4) Since Eastern's existing system would connect at St. Louis with its proposed route St. Louis-West, the Board might have found that Eastern had *not* made a *prima facie* showing that the extension of TWA to the southeast was mutually exclusive with the extension of Eastern from St. Louis to the West, but that the Board's findings were not sufficiently definite in this respect;

(5) The Board had the discretion to exclude Eastern's Memphis-Kansas City application since it would have expanded the area of investigation, albeit remaining an area case; and

(6) Because of the highly restricted nature of the Delta certification and the multitude of service possibilities available to Eastern from an extension to Kansas City from Memphis, no *prima facie* showing of exclusivity had been made and the Board had taken no action in this instance that was inconsistent with the area case as limited.

IV. "The Merits of the TWA and Delta Awards Apart From Mutual-Exclusivity Arguments, and Some Miscellaneous Contentions"

In this division the Court below disposed of the remainder of the contentions now urged by Eastern in its petition herein. In the first place, Eastern states in its petition:

> "Eastern had also urged the Court below to find that the Delta and TWA awards were not based upon proper findings of public convenience and necessity." (EAL 9)

The Court commenced division IV of its Opinion as follows:

> "Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; * * *. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board." (B22-B23)

This is a direct ruling on Eastern's contentions and the Court, as well it should, accepted the Board's "informed judgment." *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 581.

As to Eastern's recitation of the requirements for findings as stated in *United Air Lines, Inc. Red Bluff Operation*, 1 C.A.A. 778, 779-90 (1940) (EAL 13-14) these very matters were raised by Eastern in the Court below and specifically answered by Delta with respect to its certification in the Birmingham-Memphis market. In short, the Board made findings in connection with all of these matters in finding need for the services

for which Delta was certificated (J.A. 505). Furthermore, the Board in fact found that:

> "* * * we are satisfied that the authorization of such service can be provided without any undue adverse effect on the overall operations of Eastern." (J.A. 505)

Clearly, the Board *did* make the findings requested by Eastern.[18]

With respect to Eastern's final contention as to announcing tentative Board votes in a press release, this matter was dismissed by the Court below in the final two sentences of its Opinion:

> "Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error." (B24)

As Delta pointed out on Brief to the Court below, the Board has stated that a press release announcement is not a final decision in the following language:

> "It is evident that Eastern's attack is premised upon the assumption that the press release which we issued in this case embodied our decision in the proceeding. However, this is not the case. As a matter of fact, a press release could not legally constitute a decision since Section 1005(f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act both require that

[18] It should also be noted that Eastern's citation (EAL 14) from the Board's Opinion in the *South Central Area Local Service Case* (CAB Order E-13648, p. 62, March 21, 1959) when read in contex, reveals that the Board was concerned with a matter of increased Federal subsidy to a local service carrier. Here there is no subsidy involved and as indicated above, the Board specifically found no undue adverse effect on Eastern.

> to be effective a decision must be accompanied by findings. Our press release is no more than a public statement of the tentative vote on a given case by a majority of the Board, and the vote is no more final in a case in which a press release is issued than it is when a press release is not issued."[19]

A recent example of change from a press release announcement is found in the Board's final opinion in the *Seven States Area Case*[20] (a case of major proportions), where the Board's decision differed from its press release announcement in substantial measure—namely, (1) certificating a route segment to a different carrier than announced in the press release, (2) extending a route award to a different terminal than announced in the press release, and (3) omitting *any* certification of a route announced in the press release. That action by the Board effectively disposes of Eastern's arguments concerning prejudgment.

Eastern argues that there is a conflict of views between the Second Circuit and the Court below because the Court below did not discuss specifically the press release argument of Eastern. (EAL 30) To the contrary, it is clear that there is *no* conflict since, as indicated *supra*, the decision of the Second Circuit was filed with the Court below some two months before its own Opinion was issued. Having had the Opinion brought specifically to its attention, the Court has indicated concurrence since it obviously saw no need to comment on or distinguish the Second Circuit Opinion but merely dismissed this contention of Eastern as "no reversible error." (B24)

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[19] *New York-Florida Case*, CAB Docket No. 3051, *et al.*, Order No. E-10884, p. 16.

[20] C.A.B. Docket No. 7454, *et al.*, Order No. E-13254, dated December 8, 1958.

Summary

It is clear that the imagined conflicts cited by TWA and Eastern are illusory. There is, therefore, no reason for this Court to review the case below on certiorari. So long as the *Ashbacker* principle continues to be applied to air route cases under the informed and skillful guidance of the Court of Appeals for the District of Columbia Circuit without conflict from other circuits, it would be inappropriate and an undue burden for this Honorable Court to be required to review these decisions except under the most compelling circumstances. Such circumstances are clearly absent herein. Significantly the Government (acting on behalf of the Board) has not requested a writ of certiorari which it most certainly would have were the bogey men conjured up by TWA and Eastern other than illusory. As demonstrated above, the opinion of the Court below is clear and consistent.

CONCLUSION

For the foregoing reasons Delta submits that the Petitions of TWA and Eastern for a writ of certiorari should be denied forthwith.

Respectfully submitted,

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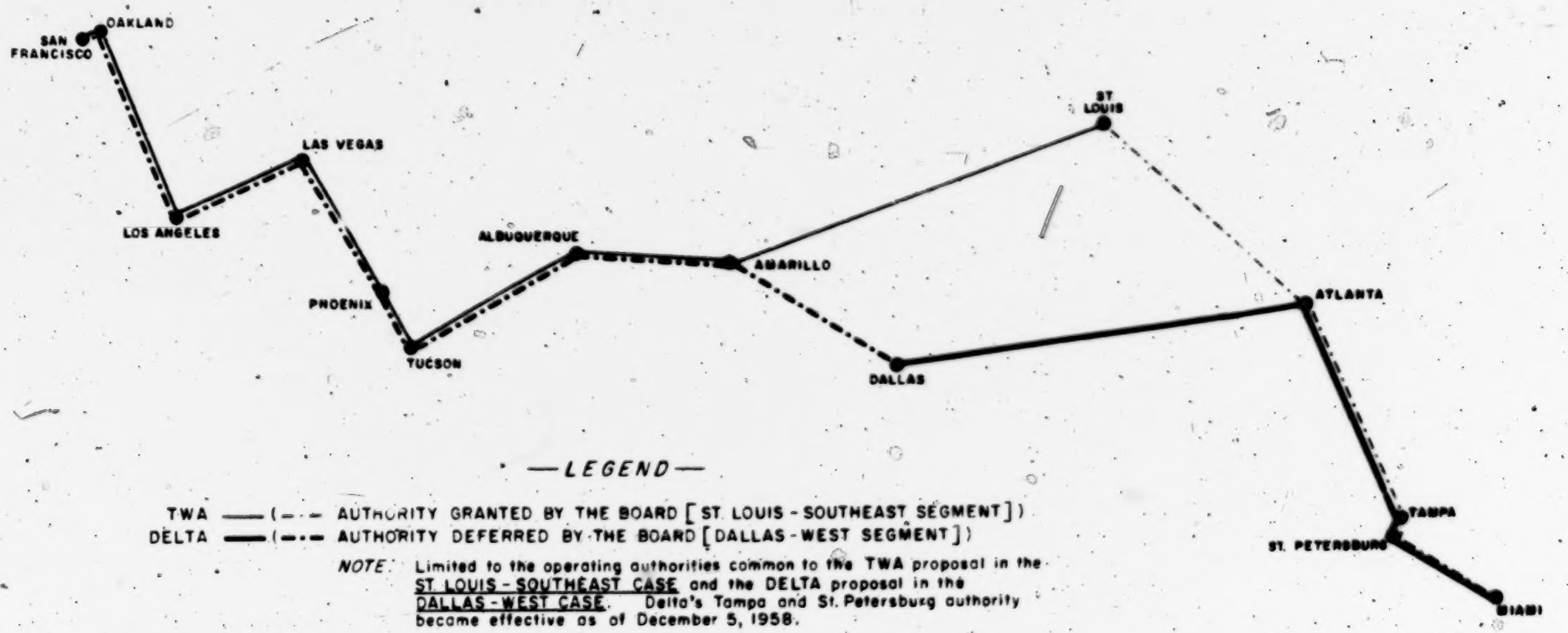
Of Counsel

April 8, 1960

APPENDIX A

SCHEMATIC REPRESENTATION (GEOGRAPHICALLY ACCURATE) OF THE SOUTHERN TRANSCONTINENTAL SERVICES COMMON TO THE DEFERRED DELTA PROPOSAL AND THE GRANTED TWA PROPOSAL

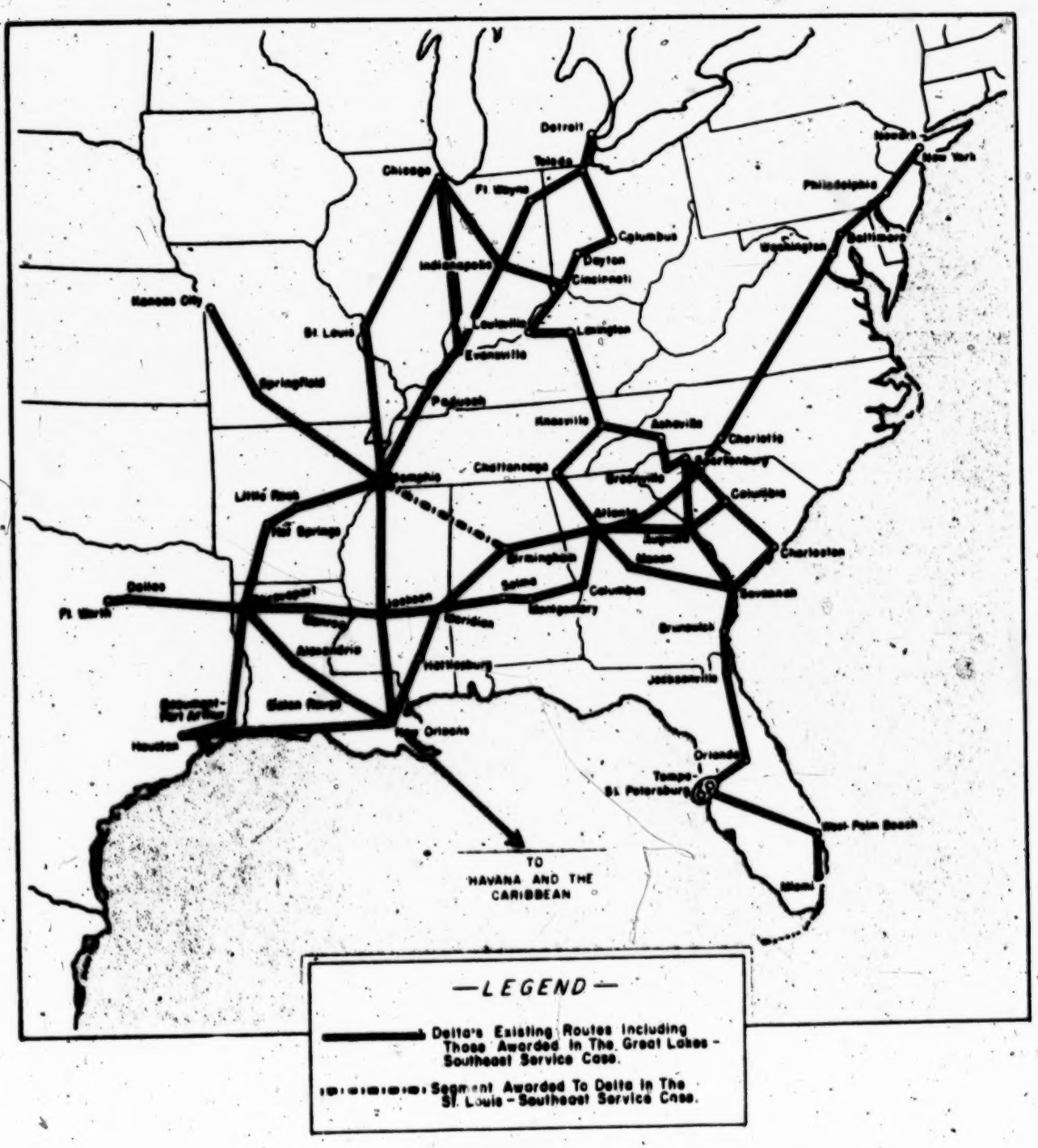


—LEGEND—

TWA ——(— · — AUTHORITY GRANTED BY THE BOARD [ST. LOUIS - SOUTHEAST SEGMENT])
DELTA ——(—·— AUTHORITY DEFERRED BY THE BOARD [DALLAS - WEST SEGMENT])

NOTE: Limited to the operating authorities common to the TWA proposal in the ST. LOUIS - SOUTHEAST CASE and the DELTA proposal in the DALLAS - WEST CASE. Delta's Tampa and St. Petersburg authority became effective as of December 5, 1958.

DELTA ROUTE MAP SHOWING AWARD TO DELTA IN THE ST. LOUIS - SOUTHEAST SERVICE CASE



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CITATIONS

CASES:

Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 ..... 6, 10, 11, 12, 13
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Civil Aeronautics Act of 1938, 52 Stat. 973 *ff* as amended, 49 U.S.C. 1952 ed., § 401 *ff* 9, 14
Taft-Hartley Act, 51 Stat. 148, 29 U.S.C. (Supp. III) § 160 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*, v. DELTA AIR LINES, INC., *Respondent*.	No. 679
EASTERN AIR LINES, INC., *Petitioner*, v. CIVIL AERONAUTICS BOARD, *Respondent*.	No. 777

BRIEF OF NATIONAL AIRLINES, INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

National Airlines, Inc. ("National") opposes the grant of writs of certiorari requested by Petitioners, Trans World Airlines, Inc. ("TWA") and Eastern Air Lines, Inc. ("Eastern") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

COUNTER STATEMENT OF CASE

National was one of the petitioners for review in the proceeding below.

National's interest in this case arises out of the Civil Aeronautics Board's ("the Board") award of an effective transcontinental air route to TWA between Florida and California. This award was made in the *St. Louis-Southeast Service Case,* a case in which all applications for new air service outside an area extending from St. Louis, Mo. to Miami, Fla. were expressly excluded from the proceeding.

Despite the limitation of the area of the proceeding, the Board certificated TWA between St. Louis and Florida in such a manner that TWA can (and does) operate between Florida and California with only one mandatory intermediate stop, at St. Louis. As a result of this route award, TWA is able to serve the Florida-California route on a most effective and expeditious basis.

The effect of the TWA award on National was threefold:

1. It has resulted in the loss of a substantial volume of traffic from National's operations between Florida and New Orleans. (National participates in a three-carrier through-plane interchange service with American Airlines, Inc. ("American") and Delta Air Lines ("Delta") between Florida and California. National operates the Miami-New Orleans segment of the interchange service).

2. It has had the effect of jeopardizing the grant of National's application for a Florida-California route in the pending *Southern Transcontinental Service Case.* Under long established principles the existence of TWA's service is a relevant and material factor to be considered in

determining whether or not National's proposed route is required by the public convenience and necessity and whether there should be more than one carrier certificated.

3. TWA was selected for the St. Louis-Miami operation on the ground, *inter alia*, that it could provide services to California and other areas west of St. Louis, whereas National could not provide such service because the Board excluded all applications for new routes west of St. Louis.

National petitioned for review of the Board's decision because the decision unfairly prejudiced and or precluded National's long-standing application for a southern transcontinental route.

The opinion of the Court below (Appendix B of each of the Petitions for Certiorari herein) sets forth a full and fair review of the facts. We will not attempt any major restatement of the facts but will attempt to point out the factors which we consider to be of outstanding importanee:

1. As the Court below found, (App. B, pp. B-4-5 to TWA Petition), National insisted at the outset of the proceeding before the Board that the proceeding should either be confined so as to exclude transcontinental services or expanded to include National's application for through service between the Southeast and the Pacific Coast (R. 63-65).

2. The Board responded to this request by:

(a) rejecting the requests for expansion of the issues (R. 92-93; R. 94-95; R. 97-99);

(b) ruling that a mandatory stop at St. Louis would be required without prejudice to a renewal of the re-

quests for more stringent limitations prior to final decision (R. 93-94).

As the Court below found, the Board's consolidation order did not contemplate a hearing on southern transcontinental issues. The order fairly indicated that such issues were not to be considered and that any award to TWA would be so conditioned as to preclude effective transcontinental services. Significantly, the Board did not place in issue the question whether an award to TWA would be mutually exclusive of the pending applications of other parties for southern transcontinental service.

The Board's decision failed to recognize the limitation against southern transcontinental issues; on the contrary it awarded TWA the St. Louis-Southeast route for the express reason that TWA could thereby provide single carrier southern transcontinental service. (TWA, p. B-5)

In reversing and remanding the TWA award, the Court below *did not hold* that the Board was precluded from awarding TWA a transcontinental route in the *St. Louis-Southeast Case*. It merely held, that the Board could not restrict the case to St. Louis-Southeast issues and, without more, grant TWA what is in reality a southern transcontinental route without affording the parties a hearing on the issue of mutual exclusivity where a prima *facie indication* of mutual exclusivity appeared on the record (TWA, B-14).

The factors which form the basis of the Court's opinion appear to be:

1. The Board's own findings confirmed the fact that the route awarded to TWA was an effective southern transcontinental route (TWA, p. B-10).

2. In prior proceedings the Board had concluded that the southern transcontinental route would not support two competing operations (*Ibid.*, p. B-11).

3. The Court concluded from the foregoing facts that a *prima facie* claim of mutual exclusivity had been established and that a hearing on the question was therefore required (*Ibid.* p. B-12)

4. The Court held further that the Board's findings that the award to TWA was not mutually exclusive of the other applications—were not based on evidence, and were not consequent to a hearing on the issue of exclusivity. (*Ibid*, p. B-14)

5. The Court concluded that the parties were entitled to a hearing on the issue of mutual exclusivity and that such a hearing had not been afforded them. (*Id.*)

It is this unusual (and virtually unique) set of circumstances which furnishes the basic foundation of the decision of the Court of Appeals. We submit that the Court's decision is eminently correct and that there is no significant basis for this Court exercising its jurisdiction to review what is, in essence, a vindication of the right to reasonably adequate notice and hearing in air route proceedings.

ARGUMENT

The Application of the Ashbacker Doctrine to Air Route Proceedings Requires the Evaluation of Each Situation on Its Own Merits in Order That the Civil Aeronautics Board May Have Reasonable Flexibility in Administering the Act While Providing the Necessary Due Process of Law.

There is a certain superficial plausibility in the argument that this Honorable Court should resolve the question as to the application of the *Ashbacker Doctrine* to airline route cases. We respectfully submit, however, that an attempt to delineate the precise application of the doctrine at this time would either (a) deprive the affected parties and the public of a fair hearing on important route applications or (b) deprive the Civil Aeronautics Board on the discretion required to manage and dispose of its docket on a most expeditious and effective basis.

The determination whether or not the hearing and award of one application will be mutually exclusive of other applications involves an evaluation of numerous facts which vary from case to case. The Board, with the Courts' approval, has generally exercised certain discretion in hearing and granting conflicting applications based on the Board's judgment that the award of one route will not preclude the award of the competing application. This policy has been applied in many cases and has worked out satisfactorily in most instances.

For a number of years past, the Board and the Courts of Appeal have generally followed what can be termed a "rule of reason" in the application of the *Ashbacker Doctrine* to air route cases. In most cases the Board's evaluation of the problem is acquiesced

in by the parties. In those cases where the matter has been challenged in Court, the Courts have upheld the Board's decision as to the applicability of the doctrine except in one prior case[1] where the Court found that the Board had in reality denied the applicant a fair hearing by hearing and granting one of two mutually exclusive applications while failing to provide a contemporaneous hearing on the other. Each case must necessarily be decided on the basis of its own facts by the Board. Only in one prior case where it was clearly established that an applicant has been denied a fair hearing have the Courts reversed the Board in determination of mutual exclusivity and related issues.[1]

The decision in this case marks another step in the process of reconciling the requirements of administrative expedition against the basic requirement that an applicant be afforded a hearing before his pending application is denied by the award of the route to another applicant.

The decision below affirms the previously established principle that the Board must afford a hearing on *Ashbacker* issues in cases where one application is heard and decided and a competing application is passed over *if there is a prima facie indication of mutual exclusivity*. The Court does not require that this be done prior to hearing but only that such an opportunity for hearing be provided either before or as a part of the main hearing. This is not an onerous duty. Indeed it is no burden at all on the Board. Such opportunity has been provided and exercised in other

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[1] Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F. 2d 339 (C.A.D.C. 1952).

proceedings without noticeable affect upon the length or scope of the hearing.[1]

The Issues Herein Do Not Justify the Exercise of the Supreme Court's Certiorari Jurisdiction.

In *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 453 (1951) this Honorable Court considered the proper scope of its discretionary jurisdiction with respect to decisions of the Courts of Appeals in review of decisions of Federal Administrative Agencies. The Court stated at 340 U.S. 453, 456:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *'. *Taft-Hartley Act*, § 10(e) 61 Stat. 148, 29 U.S.C. (Supp. III) § 160(e), 29 U.S.C.A. § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of *importance to to the public*, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority

[1] In the *Dallas-West Service Case*, Docket No. 7596, the Board afforded the parties the right to introduce evidence re: mutual exclusivity and determined after full consideration, that the case should be deferred on this ground. (J.A. 789-90). Significantly, the Board had previously found, prior to hearing that no mutual exclusivity existed.

between the Circuit Courts of Appeals.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712; *Revised Rules of the Supreme Court of the United States*, Rule 38, subd. 5, 28 U.S.C.A. * * *

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193." (*Emphasis Supplied*).

Although the language of the Civil Aeronautics Act is somewhat different from that of Section 10(e) of the *Taft Hartley Act* with respect to the jurisdiction of the Courts of Appeals, it is clearly intended to confer the same type of jurisdiction.

Section 1006 of the Civil Aeronautics Act provides, *inter alia*, as follows:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia * * *. (EAL App. A, p. A-8)

* * * *

"(d) * * * the court shall have exclusive jurisdiction to affirm, modify or set aside the order complained of * * *." (App. A)

* * * *

"(f) The judgment and decree of the court affirming, modifying or setting aside any such order shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in Sections 346 and 347 of Title 28." (EAL App. A, p. A-8)

The principles cited in *Pittsburgh S.S. Co., supra,* are plainly applicable here.

(a) Congress has charged the Courts of Appeals—not the Supreme Court—with the normal and primary responsibility of reviewing and determining the legal adequacy of the Board's decision;

(b) this case does not involve—"principles the settlement of which is of importance to the public, as distinguished from that of other parties";

(c) nor does this case involve—"a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

In this case and in the companion petitions for writ of Certiorari to the Second Circuit Court of Appeals, the decisions apply the so-called *Ashbacker Doctrine* to two differing sets of facts and arrive at conclusions which are different but not in conflict. If this Court were to exercise its jurisdiction and attempt to prescribe more precise rules for the application of the *Ashbacker Doctrine*, it is difficult to perceive how such action would have any significant importance to the public.

Although the petitioners assert that there is a conflict of opinion between the Second Circuit and the District of Columbia Court, the fact is that the two decisions involve different factual situations and, in final analysis, different issues. It is important to consider that the Second Circuit made the same ruling with respect to Eastern Air Lines' claim of mutual exclusivity as did the Court of Appeals for the District of Columbia in an earlier decision. Eastern petitioned the Court of Appeals for the District of Columbia for review of the Board's Order of consolidation in the so-called *Great Lakes-Southeast Service Case* on the ground that the Board had improperly refused to grant a hearing on Eastern's application to extend its Florida-Chicago route to Minneapolis/St. Paul and beyond. The Court of Appeals rejected Eastern's petition in a strongly worded opinion which emphasized the fact that the *Ashbacker Doctrine* "is not available for mere tactical maneuver purposes". *Eastern Air Lines v. Civil Aeronautics Board*, 243 F.2d 607, 609 (1956).

The Second Circuit, when presented with the same set of facts, held that Eastern had not been denied due process of law when the record showed that Eastern had introduced no evidence in support of its claim of mutual exclusivity in a case where the Board had expressly placed the question of mutual exclusivity in issue.

The present case deals with an essentially different factual situation. In the present case the Board indicated to the parties that the case would be confined to St. Louis-Southeast issues and that the Board would consider the imposition of additional restrictions (over and above a mandatory St. Louis stop) in order to

foreclose the grant of an effective southern transcontinental route.

When the Board awarded the route to TWA without any additional restrictions and made affirmative findings that such an award was based on the ability of the route to provide southern transcontinental service, and when the Board's latest consideration of the southern transcontinental route had resulted in a finding that the route would support only one operation (TWA, p. B-11) the Court properly determined that there was a *prima facie* showing of mutual exclusivity and that the Board had denied the parties a fair hearing on their competing applications when it failed to afford a hearing on the mutual exclusivity issue.

In the case before the Second Circuit the prospect of Northwest's operating a Twin Cities-Florida service with only one stop was clear from the outset. The issue of mutual exclusivity was placed in issue by the Board's consolidation order and the Second Circuit found that no evidence had been offered in support of the claim of mutual exclusivity. This contrasts with the present case where the *Board's own findings* establish the effectiveness of the TWA route and where the *Board's own findings* in its latest decision on the point establish the fact that the route would not support two carriers.

The basic point of the decision here is that the facts —as demonstrated by the Board's own findings— establish a *prima facie* showing of mutual exclusivity. The Second Circuit made no such finding.

The contention is also made that the Court was inconsistent in requiring a hearing on *Ashbacker* issues with respect to the TWA award but not requiring a similar hearing on the Delta award. The

Court's opinion sets forth the distinction between these cases. Little more need be said except that there was no *prima facie* indication that the heavily restricted Delta award would preclude a later award to Eastern of a Kansas City-Florida route. Eastern already operates from Florida to both Memphis and St. Louis. The factors governing its extension into Kansas City are very different than those governing the award of a new southern transcontinental award.

The distinction between these two situations illustrates the necessity for flexibility wherein the Board is left with as much freedom to deal with *Ashbacker* problems as is consistent with the basic requirements of a fair hearing.

There is no basis for the exercise of the Court's jurisdiction in these facts nor in any of the other points raised by the petitioners.

CONCLUSION

The Petitions for Certiorari should be denied. They do not present principles the settlement of which are important to the public nor do they involve any real or embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. TWA's southern transcontinental award which has been held invalid by the Court below—has now been in operation for more than 15 months to the serious detriment of National and its interchange partners. National requests that the petitions for certiorari be promptly denied.

Respectfully submitted,

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Vice President
Attorney for
NATIONAL AIRLINES, INC.

APPENDIX A

Subsection 1006(d) of the Civil Aeronautics Act of 1938, as amended 52 Stat. 977, 49 U.S.C. 601.

Section 1006(d).

"Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Board."

ILE COPY

Office-Supreme Court, U.S.
FILED
MAR 17 1960
JAMES R. BROWNING, Clerk

No. 679

IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.

Petitioner,

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

MEMORANDUM OF CITY OF ST. LOUIS AND CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS

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No. 679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Trans World Airlines, Inc.

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

MEMORANDUM OF CITY OF ST. LOUIS AND CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS

The City of St. Louis, Missouri and the Chamber of Commerce of Metropolitan St. Louis (hereinafter sometimes referred to as "St. Louis") have been named as respondents herein solely by virtue of their appearance as intervenors in the proceedings before the Court of Appeals for the District of Columbia Circuit. Therein, however, St. Louis did not seek to set aside the orders of the Civil Aeronautics Board which authorized valu-

able competitive service by Trans World Airlines, Inc. between St. Louis and the Southeast. On the contrary, as the record makes clear, it was upon petition of St. Louis that the inquiry by the Board was originally undertaken, and throughout the proceedings before the Board and before the Court of Appeals, St. Louis vigorously supported the need for the service eventually authorized by the Board.

St. Louis is therefore wholly in accord with the petitioner herein that the action of the Court of Appeals in reversing and remanding the Board's order is unjustified and should be reviewed by this Honorable Court. The public need for the service authorized was duly found, as the Court agrees; so also were valid grounds for the selection of TWA, as the Court likewise appears to hold. St. Louis is therefore unable to rationalize why the service should be disturbed because of tangential considerations of southern transcontinental service. The issues of such service, present or prospective, are so remote from the issues litigated below that St. Louis has taken no position with respect thereto in any proceedings before the Board. Indeed, the geographical limitation upon all proceedings before the Board, past and present, relating to southern transcontinental service have been so far removed from St. Louis that it has assumed that it would have no interests therein upon which it could premise a meritorious petition for leave to intervene.

On the other hand, the award granted by the Board to TWA has made possible over the past 14 months services of immense value to St. Louis. The improved services furnished by TWA to and from Nashville, Atlanta, Tampa/St. Petersburg and Miami (including nonstop service with the most modern jet aircraft to and from the last named city) represents an important

contribution to the convenience and necessity of thousands of St. Louis' air travelers. The present route pattern has enabled TWA to schedule more and better flights between St. Louis and the Southeast. These schedules, which have been very beneficial to St. Louis, would not be possible if TWA was required to terminate flights in St. Louis. Therefore, St. Louis urgently requests this Honorable Court to continue this service until the issues are adjudicated.

St. Louis' familiarity with the historic service provided by Eastern in this area and with the facts adduced in the extensive proceedings below confirm beyond cavil the Board's findings that the traffic available to TWA to and from points west of St. Louis has contributed significantly to the high quality of service provided by that carrier between St. Louis and the Southeast. To premise legal error upon that circumstance, as the Court of Appeals appears to have done, would seem to bring the law into serious conflict with the basic economics of air transportation and with the public interest.

Consequently, the City of St. Louis, Missouri and the Chamber of Commerce of Metropolitan St. Louis support the position of the petitioner herein.

Respectfully submitted,

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City Counselor and
Chief Legal Officer of
The City of St. Louis

Aloys P. Kaufmann
President and
Chief Legal Officer of the Chamber
of Commerce of Metropolitan St. Louis

CERTIFICATE OF SERVICE

I, Aloys P. Kaufmann, one of the attorneys for City of St. Louis, Missouri and the Chamber of Commerce of Metropolitan St. Louis, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of February, 1960, I served copies of the foregoing Memorandum, by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the following persons:

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No. 679

IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

REPLY BRIEF FOR PETITIONER

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* Numbers followed by "n" refer to footnotes.

IN THE

Supreme Court of the United States

October Term, 1959

No. 679

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

DELTA AIR LINES, INC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

This reply is addressed to the Memorandum for the Civil Aeronautics Board (submitted jointly by the Department of Justice and counsel for the Board) and the briefs in opposition of American, Delta and National.

I.

The Conflict Between the Decision Below and the Second Circuit Decision in the *Eastern* Case

The decision below plainly conflicts with the Second Circuit decision in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752, petition for a writ of certiorari pending, case No. 785, this Term.

Both courts found that Eastern realized it had full opportunity throughout the proceeding to litigate the issue of mutual exclusivity.

In both cases, Eastern failed to submit any evidence on that issue at the hearing but tried to cure its default, after the decision, by a petition for reconsideration.

The Second Circuit held the issue was waived. The court below held the issue was not waived, and Eastern was entitled to findings on it. The Government agrees that "the decision of the Second Circuit on this matter is clearly correct" (Memorandum, p. 10).

American, Delta and National note that the point arose in different factual contexts. That is utterly immaterial. The important thing is that the two Courts reached diametrically opposite results, although Eastern's course of conduct was identical in the two cases.

The Government suggests that "if the decision here is deemed to rest on the notice point, there is no necessary conflict" between the two decisions (Memorandum, p. 9). The suggestion is untenable.

Both courts found—as the Government admits—that Eastern "was on notice of its rights to introduce evidence as to mutual exclusivity" (*ibid.*). How it got that notice was immaterial. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579. Notice is notice, however it comes. In such matters, "we are governed by the substance of things and not by mere form." *Simon* v. *Craft*, 182 U. S. 427, 436. The decisions are squarely in conflict.

II.

The Confusion Engendered by the Court's Erroneous Decision

The Government agrees that, on the other phase of the case—which concerns American, Delta and National—the decision below "was based on an erroneous reading of the record" (Memorandum, p. 8).

It suggests, however, that "the Board *may* well be able to avoid the impact of the case by specifying its practice with even greater particularity in future cases" (Memorandum, p. 9.)* Admittedly that is uncertain, for the Government says: "The scope of the decision below and of the grounds on which it rests is not altogether clear" (Memorandum, p. 1).

1. The decision would merit review even if, on this phase of the case, the court below had discussed nothing but the question whether American, Delta and National were on notice that they could litigate mutual exclusivity.

Civil Aeronautics Board v. *State Air Lines, Inc.*, 338 U. S. 572, involved almost wholly the question of adequacy of notice in an air route proceeding. Yet it was reviewed by this Court because the question was so important (p. 575).

2. But the court below discussed a host of other matters. Its decision contains flat pronouncements on several aspects of the Board's procedures. None was characterized by the court as unnecessary to its decision. No one knows what the case really means. The prospects for confusion are stupendous.

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* Emphasis is ours.

The decision below can be—and doubtless will be—seized on to support a number of positions, such as:

(a) The Board must make a finding of public convenience and necessity for each effective service made possible by the grant (App., pp. B8-B9, B-15).*

(b) The Board must follow *Delta* procedures on *Ashbacker* claims (App., p. B20).**

(c) Evidence on matters of defense raised after decision must be considered (App., p. B20).

At the agency level, the Government appears ready to resist such claims (Memorandum, pp. 4 fn., 8-9, 10). On review, it hopes to persuade the courts that only dicta in the opinion below support those claims. Yet admittedly even it is uncertain what the decision means and how far its troublesome implications go. It concedes, too, that if the "decision enunciates general rulings of law as to the implications of the *Ashbacker* rule" which "will require substantial and unwarranted alterations in the Board's procedure, review by this Court would be justified" (Memorandum, p. 2).

Unless the Court intervenes now, long litigation appears inevitable before meaningful answers are forthcoming. The opinion below will breed intolerable confusion in the myriad of complex route cases on which the Board must pass.

As the air transportation pattern is enlarged, the *Ashbacker* doctrine is being brought more and more into play.*** This Court should resolve now the confusion to

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* As the Government notes (Memorandum, p. 4), that conflicts with the "normal transportation rule" of "tacking."

** *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 228 F. 2d 17; *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327.

*** Indeed, the decision below extended the *Ashbacker* doctrine to impact upon *existing* services.

which the erroneous decision below has added—even if only by way of what may (or may not) be dicta.*

III.

The Non-existent Independent Ground of Decision

Both American (Brief, p. 18) and Delta (Brief, pp. 13-14) purport to perceive in Part II of the decision below (App., pp. B15-B16)** an independent ground of decision not challenged by petitioner. The Government sees no such ground. Nor is there any. Part II of the opinion simply adopts the reasoning of Part I (App., p. B15):

> "We have said enough under I, *supra*, to show we agree with that argument."

But if such an independent ground were present, it would be directly challenged by No. 3 of the Questions Presented (Petition, p. 3) and by the notation of TWA's view that all necessary procedures were had with respect to impact on the interchange (Petition, p. 28).

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* In *Lawlor* v. *National Screen Service Corp.*, 352 U. S. 992, this Court granted certiorari even though the decision below was correct because the dicta of the Court of Appeals would embarrass future proceedings in that particular case. *A fortiori* certiorari should be granted where the decision below was erroneous and the supposed dicta of the Court of Appeals will embarrass future proceedings in cases affecting a whole industry.

** This relates to the Board's procedures to determine the impact on the existing interchange.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 18, 1960

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IN THE

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OCTOBER TERM, 1959

TRANS WORLD AIRLINES, INC., *Petitioner*,
v.
DELTA AIR LINES, INC., *et al.*, *Respondents*,
No. 679

EASTERN AIR LINES, INC., *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.
No. 777

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF DELTA AIR LINES, INC. TO REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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v.
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REPLY OF DELTA AIR LINES, INC., TO REPLY OF EASTERN AIR LINES, INC., TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Delta Air Lines, Inc., (Delta) a Respondent herein, hereby replies, under Rule 24(4), to the Reply Brief of Petitioner Eastern Air Lines, Inc., (Eastern). Petitioner Trans World Air Lines, Inc., (TWA) also filed a Reply Brief but it raises no matters not already adequately covered in Delta's original Brief in Opposition.

I. EASTERN'S ASHBACKER CONTENTION

A. Eastern's Reply to the Question of Notice

At pages 3-5 of its Reply herein Eastern would have the Court believe there is no difference in the award to TWA of a transcontinental route and the certification of Delta between Memphis and Birmingham, and implies that Eastern therefore had no notice that Delta could be awarded the authority which was awarded. There are three answers to this contention, all or any one of which is fully dispositive of Eastern's argument.

In the first place, the award of a Kansas City-Memphis route to Eastern would *not* be the same route as the certification of Delta between Birmingham and Memphis. Delta commented on this aspect of Eastern's contentions at pages 20-21 of its Brief in Opposition wherein it pointed out that the Court below recognized Eastern's tactics of trying to break any route question into a multitude of segment possibilities, *ad infinitum*. No further reply to Eastern is needed in this regard.

Secondly, the possibility of provision of Kansas City-Memphis-Southeast service by Delta was in issue from the time of the Civil Aeronautics Board's (Board's) Consolidation Order,[1] so that Eastern did have notice from the outset. The Board pointed out that it would consider restrictions to prevent *Ashbacker* problems and in fact it *did* severely restrict Delta's authority for flights serving either St. Louis or Kansas City, on the one hand, and a Florida point on the other since it made mandatory a stop at Memphis *and* Birmingham *and* Atlanta. Furthermore, the matter of notice was not included in Eastern's Petition for Review in the Court below, and accordingly, Eastern is not in a position to raise it now.

Finally, Eastern did not timely file its Motion for Consolidation of its Memphis-Kansas City application.

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[1] Order No. E-10304 (J.A. 89).

Rule 12(b) of the Board's Rules of Practice in Economic Proceedings states:[2]

> "A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. * * *"

Under this Rule Eastern was required to request consolidation of its Memphis-Kansas City proposal in Docket No. 6834 at or before the date of the prehearing conference. The prehearing conference was held on March 22, 1956, and was attended by Eastern's counsel. Counsel did not move for consolidation of Eastern's Memphis-Kansas City application either before or at the prehearing conference. Neither did he so move in a subsequent 10-day period allowed by the Examiner for such motions. Eastern did not except to the fact that the Examiner's prehearing conference report did not show any such motion and it was not until June 16, 1956, that Eastern *first* mentioned its Memphis-Kansas City application, and then only in a Petition for Reconsideration of the Board's Consolidation Order. Since Eastern's request for consolidation was not timely filed, it has no standing in this Court to complain that its application was not consolidated.

B. Eastern's Reply as to Internal Conflict in the Decision of the Court Below

Again Eastern belabors the idea that it is entitled to every segment possibility of a route applied for by

[2] 14 CFR Sec. 302.12(b).

it considered on a segment by segment basis. But the Eastern request for a Kansas City-Memphis extension would provide infinite route possibilities to a large part of Eastern's existing system. This general flow-in of traffic at St. Louis is *all* available to support Eastern's Memphis-Kansas City proposed extension. The Board has found that the highly restricted certification of Delta between Memphis and Birmingham would not preclude such an award to Eastern.[3] Again the Court's attention is invited to pages 20-21 of Delta's Brief in Opposition.

C. Eastern's Reply Concerning Alleged Conflict Between Circuits

In the first place, Delta did *not* assert in its Brief in Opposition that the Court below found that Eastern had made a *prima facie* showing of exclusivity despite Eastern's contentions to the contrary in its Reply.[4] The Court below said that it did not know whether Eastern had made such a showing since the Board's opinion was not clear on the point. The Court pointed out that Eastern may not have made the required showing because of the backup traffic which it got from its existing routes in the Northeast through St. Louis.[5] This is an example of Eastern's attempt to mislead the Court.

Furthermore, as Delta pointed out at page 19 of its Brief in Opposition the procedural background of this

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[3] In this connection reference is made to Footnote 2 on page 5 of Eastern's Reply Brief. Delta knows of no Board pronouncement, either official or unofficial, that supports the proposition that provision of through-plane service shows effective route while lack of through-plane service shows lack of effective route. It is significant that Eastern cited no such authority.

[4] Eastern's Reply Brief, page 8.

[5] See discussion contained in Delta's Brief in Opposition, pp. 16-19, 21-22.

case and the Second Circuit Case of *Eastern Air Lines v. Civil Aeronautics Board*, 271 F. 2d 752 (1959), are not comparable. In the within case the Board made it clear that it was limiting the case to a St. Louis-Southeast area case. Eastern took no appeal from that consolidation order. On the other hand, Eastern *did* take an appeal[6] from the consolidation order in the Second Circuit case and was fully aware of the matters in issue. The procedural background of the two cases is not in the least comparable.

II. EASTERN'S REPLIES TO MISCELLANEOUS MATTERS

At page 15 of Eastern's Reply it suggests that because the Eastern-Braniff Airways, Inc., (Braniff) interchange between Kansas City and Atlanta could be duplicated by the certification of Delta between Memphis and Birmingham, the award to Delta was improper. Delta would point out to the Court that not only did Eastern never raise this question at any point in the proceeding prior to its Reply Brief herein but that Braniff, which purportedly would also be involved, has made no such claim on its own behalf. Furthermore, this is an additional example of Eastern's segmentation since the Eastern-Braniff interchange extends beyond Atlanta to a number of additional points in Florida, and beyond Kansas City to a number of points in the mid-West.

As a final matter at pages 16-18 of its Reply, Eastern suggests that recent legislation requested by the Board shows that the Board itself is in a quandary as to what to do about *Ashbacker* situations. Eastern, however,

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[6] *Eastern Air Lines v. Civil Aeronautics Board, et al.*, 100 App. D.. 184, 243 F. 2d 607 (1956). It should be noted that the Court therein did *not* say that *Ashbacker* did not apply in an area proceeding. The language of the Court is quoted at pages 15-16 of Delta's Brief in Opposition.

neglected to quote fully from the "Statement of Purpose and Need for Proposed Legislation" accompanying the draft bill. The material omitted by Eastern is most significant in determining the reason for the legislation and is as follows:

> "The Board recognizes that essential fairness sometimes requires contemporaneous consideration of applications and that consolidation for hearing is often the most expedient means for achieving this end. We have, however, taken the position that failure to consolidate applications for hearing does not in and of itself result in any deprivation of right, and that, in any event, legal error in consolidation, like any other that may be committed in the course of a particular case, is not judicially reviewable except as an incident to judicial review of the Board's final order entered at the conclusion of the proceeding."[7]

Eastern continued to quote from the Board's stated reasons for the legislation but omitted Items (2) and (3), which provide as follows:

> "* * * (2) provide that any judicial review of alleged errors in consolidation can be obtained only at the conclusion of a proceeding, (3) provide that the Board shall not be required to hold, prior to a hearing on the merits, a preliminary hearing on consolidation, and (4) * * *"[8]

It is perfectly clear that the reason for the Board's request for legislation is to ensure that consolidation orders are not considered final appealable orders. This rule was stated by the Court of Appeals for the District of Columbia in *Eastern Air Lines* v. *Civil Aeronautics*

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[7] 106 Cong. Rec. 6872 (daily ed. April 6, 1960).

[8] *Ibid.*

Board, et al., supra. Similarly, it is perfectly clear that Eastern is intentionally misconstruing the Board's legislative request and is a further example of Eastern's attempts to mislead this Court.

Various other arguments contained in Eastern's Reply have already been covered in Delta's Brief in Opposition and accordingly, will not be further discussed herein.

CONCLUSION

WHEREFORE, Delta respectfully prays that the Petitions for a Writ of Certiorari herein be denied.

Respectfully submitted,

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